CLERK'S COPY.

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935

No. 25

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

vs.

ST. LOUIS UNION TRUST COMPANY, AS SUCCESSOR TRUSTEE TO LIBERTY CENTRAL TRUST COMPANY, AS SOLE RESIDUARY LEGATEE AND DISTRIBUTEE OF THE AMERICAN ESTATE OF WILLIAM J. ORTHWEIN, DECEASED, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR CERTIORARI FILED APRIL 17, 1935
CERTIORARI GRANTED MAY 20, 1935

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935

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a (Order Extending Time to File Record to May 31, 1934.)

United States Board of Tax Appeals.

Commissioner of Internal Revenue, Petitioner,
Docket No. 47633. vs.
St. Louis Union Trust Company as Successor Trustee to Liberty Central Trust Company, as sole Residuary Legatee and Distributee of the American Estate of William J. Orthwein, Dec'd, joined by Mercantile-Commerce Bank & Trust Co., Successor Trustee to Mercantile Trust Co., of the Trust created by Trust Indenture of William J. Orthwein, Dated January 1, 1920, Respondent.

On motion of counsel for the petitioner, it is

Ordered: That the time for preparation of the evidence and transmission and delivery of the record sur petition for review of the above entitled proceeding in the United States Circuit Court of Appeals, Eighth Circuit, be and is hereby extended to May 31, 1934.

(Signed) EUGENE BLACK,
Member.

Dated: Washington, D. C.,
April 28, 1934.

Now, May 21, 1934, the foregoing order certified from the record as a true copy.

(Seal)

B. D. GAMBLE,
Clerk, Board of Tax Appeals.

(Endorsed): Filed in the United States Circuit Court of Appeals for the Eighth Circuit on May 26, 1934, E. E. Koch, Clerk.

1 Docket Entries.

St. Louis Union Trust Company, as Successor Trustee to Liberty Central Trust Co. Estate of William J. Orthwein, deceased, Petitioner,
Docket No. 47633. vs.
Commissioner of Internal Revenue, Respondent.

Appearances.

For Taxpayer: D. N. Kirby, Esq.,

For Comm'r.: F. T. Horner, Esq., R. F. Stanbly, Esq., T. F. Callahan, Esq., W. H. Payne, Esq.

1930
Feb. 24—Petition received and filed. Taxpayer notified. (Fee paid)

" 25—Copy of petition served on General Counsel.

Apr. 23—Answer filed by General Counsel.

" 28—Copy of answer served on taxpayer. General Calendar.

1932
Feb. 8—Hearing set April 19, 1932.

Apr. 15—Motion for 30 days continuance filed by taxpayer. 4/16/32 granted to June 1, 1932.

Jun. 1—Hearing had before Mr. Arundell on merits. Respondent moves to continue to Fall Calendar—granted.

" 1—Order of continuance to the Fall Term of 1932 entered.

Aug. 8—Motion for leave to amend petition filed by taxpayer. Amended petition tendered. 8/10/32 granted. 8/12/32 copy served.

" 17—Hearing set Oct. 17, 1932.

Oct. 5—Answer to amended petition filed by General Counsel. 10/7/32 copy served.

" 17—Hearing had before Mr. Black on motion to continue one week. Stipulating.

" 17—Order of continuance to Oct. 24, 1932 entered.

" 19—Stipulation of facts filed.

" 24—Hearing had before Mr. Smith. Submitted on stipulation of facts and record. Briefs due in 30 days.

Dec. 14—Brief filed by taxpayer.

" 17—Brief filed by General Counsel.

1933

May 16—Findings of fact and opinion rendered, Mr. Smith, Div. 5. Judgment will be entered under Rule 50.

Nov. 25—Notice of proposed redetermination filed by General Counsel.

" 28—Hearing set Dec. 13, 1933 on settlement.

Dec. 13—Hearing had before Mr. Trammell on settlement under Rule 50. Referred to Mr. Smith for decision.

" 14—Consent to settlement filed by taxpayer.

" 16—Decision entered, Charles P. Smith, Div. 5.

1934

2 Mar. 3—Petition for review by U. S. Circuit Court of Appeals (8) with assignments of error filed by General Counsel.

Mar. 10—Proof of service filed by General Counsel.

Apr. 28—Praecipe filed—proof of service thereon.

" 28—Motion for extension to 5/31/34 to complete record filed by General Counsel.

" 28—Order enlarging time to May 31, 1934, for preparation of evidence and delivery of record entered.

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3 (Petition of St. Louis Union Trust Company, as Successor Trustee, etc., et al., for Appeal.)

Filed Feb. 24, 1930, U. S. Board of Tax Appeals.

United States Board of Tax Appeals.

St. Louis Union Trust Company, as successor trustee to Liberty Central Trust Company, as sole Residuary Legatee and Distributee of the American Estate of William J. Orthwein, deceased; joined by Mercantile Commerce Bank & Trust Company, Successor trustee to Mercantile Trust Company, of the trust created by trust indenture of William J. Orthwein, dated January 1, 1920,

Petitioners,

Docket No. 47633. vs.

Commissioner of Internal Revenue, Respondent.

(A) Jurisdiction. This appeal is from a proposed deficiency in Federal Estate Tax against the American estate of William J. Orthwein, First District of Missouri.

The "Liberty Central Trust Company", organized and doing business as a Trust Company under the laws of the State of Missouri, was named as Executor of the American Estate of William J. Orthwein, who died in Switzerland, September 4, 1925, a resident of Switzerland, and leaving a substantial estate in America (a large part of which was situated in St. Louis, Missouri), of which the will appointed said Liberty Central Trust Company Executor. Said Liberty Central Trust Company probated, in the Probate Court, City of St. Louis, an authenticated copy of said will, and, pursu-
4 ant to the laws of Missouri, thereupon duly received letters testamentary and took charge of, and administered, said American estate under the jurisdiction of said Probate Court. The will appointed "La Société de Banque Swiss" (Swiss Bank Corporation) Branch of Lausanne", located at Lausanne, Switzerland, executor as to all his estate except that in America. This Swiss Bank Corporation took charge as domiciliary executor, and administered the estate under the jurisdiction of the "Court of Peace (Authority of Successions) of the Cercle of Montreux". The American administration was and is ancillary to that in Switzerland.

In due course said Executor made final distribution of the residue of the estate to itself as trustee of the trust created by said will, and was discharged as executor. Thereafter, the "St. Louis Union Trust Company", a Trust Company organized and doing business under the laws of Missouri, succeeded the Liberty Central Trust Company as trustee of said trust, and took over the said trust estate. Consequently, the St. Louis Union Trust Company, as sole distributee of the residue of said probated estate, is the legal successor in title and liability to said "Liberty Central Trust Company", Executor, and said trust estate in the hands of said St. Louis Union Trust Company as trustee, will have to pay any additional estate tax that may be assessed and therefore is one of the Petitioners herein.

The "Mercantile Commerce Bank and Trust Company", of St. Louis, Missouri, is successor trustee to "Mercantile Trust Company" of the trust created by Trust Indenture made by said William J. Orthwein, dated January 1, 1920, and it
5 joins in this appeal because the Commissioner seeks to include within the estate of William J. Orthwein, the assets that constituted the corpus of said last named trust estate.

(B) Amount Etc., of Alleged Deficiency. The amount of the alleged deficiency is Fifteen Thousand Five Hundred

Sixty-five Dollars Eighteen Cents ($15,565.18), and the nature of the tax is a Federal Estate Tax. Petitioners are unable to state the exact amount of tax in controversy, but it will be such amount as rests upon the determination of the respective assignments of error herein set out.

(C) Assignments of Error.

(1) Under the title "Transfers", the Commissioner erroneously treats as part of the estate, what is described in the statement attached to the notice of deficiency as "Remainder Value of Property Transferred in Trust $34,544.06".

This item covers the above mentioned trust estate created by Trust Indenture made by decedent January 1, 1920, whereby he transferred and delivered absolutely and irrevocably to the Mercantile Trust Company, as trustee, the assets in the above amounts that are now erroneously sought by the Commissioner to be treated as assets of decedent at the time of his death.

Said conclusion of the Commissioner is contrary to the expressed provision of Article XI, Regulations 68, and is contrary to the facts and to the law under the facts. Said assets may not validly be included in the estate of decedent.

(2) The Commissioner erred in respect of the item entitled "Jointly Owned Property, Items 1 to 5 inclusive", re-
6 turned at Forty-one Thousand Nine Hundred Fifty-six Dollars Twenty-five Cents ($41,956.25) determined at Eighty-four Thousand Three Hundred Fifty Dollars ($84,350.00) as shown in said notice of deficiency, in treating same as taxable at all.

According to Petitioner's present information, the property referred to consisted at the time of the death of William J. Orthwein of an interest in the nature of a joint tenancy with right of survivorship, created by a "Joint Account Agreement", entered into by said William J. Orthwein with his daughter, several years before his death. According to such information as petitioners now have, pursuant to said right of survivorship, the entire title belonged to his daughter at his death and he had no taxable interest therein.

Therefore, the Commissioner erred in seeking to include said item in the property owned by said decedent at the time of his death. If the proofs expected shortly from Switzerland, show that the legal nature of the relation was a tenancy in common, then one half only of said amount should have been included.

(3) Funeral Expenses.

The Commissioner erred in not allowing as a deduction, the sum of, to-wit, $11,317.21 paid by the executor in Switzerland, as the expenses of the funeral of decedent.

(4) Executors Commissions.

The Commissioner erred in not allowing as a deduction, the sum of, to-wit, $20,793.16, Executor's commissions paid in respect of the American probate administration, and the additional sum of, to-wit, $1,252.36, paid in respect of the Swiss administration.

7 (5) The Commissioner erred in not allowing as deductions the sum of, to-wit, $7600.00 as attorneys' fees paid in respect of the American administration and, to-wit, $2,038.99, paid in respect of the Swiss administration.

(6) The Commissioner erred in not allowing as deductions, being miscellaneous administration expenses, the following amounts:

(a) The sum of, to-wit, $199.50 paid for Probate Court costs plus $40.78 for documentary stamps, in respect of the American administration, and, to-wit, $1,353.99, costs paid in respect of the Swiss administration.

(b) The sum of, to-wit, $459.41, paid for traveling expenses, to and from New York and Washington, in respect of the American estate.

(c) The sum of, to-wit, $307.71 paid by the American Executor for general administration expenses.

(7) The Commissioner erred in not allowing as deductions, being debts of decedent paid by his executors respectively the following amounts:

(a) Claim allowed by Probate Court, City of St. Louis, in favor of Liberty Central Trust Company, on note, paid by American Executor,	$16,668.47
(b) Claim of Frank Everts, allowed by same Probate Court, and paid by American Executor,	1,229.67
(c) Claim of Arthur Feuerbacher, et al., allowed by same Court, and paid by American Executor,	$ 8,589.36

8 (d) Claim of Liberty Central Trust Company as Custodian, allowed by same Court and paid by American Executor, $ 350.00

(e) Claim of Espenhain Estate Company, allowed by same Court and paid by American Executor, 3,150.00

(f) Debts paid by Swiss Executor pursuant to the usual course of the Swiss administration, which Petitioners are now informed does not require prior allowance by the Swiss Court, $46,750.48

(g) Taxes, decedent's indebtedness for which accrued before his death, and which were therefore debts of decedent, and paid as such, by the respective Executors: In America:

Item I: Additional Federal Income taxes for 1922, $ 933.40

Item II: Additional Federal Income taxes for 1923, 786.95

Item III: Federal Income taxes for 1925, part of year prior to death, 1,578.46

Item IV: State property tax, on personal property, for 1925, a debt before death, 645.00

Item V: State property taxes for 1925 on real estate in Utah, 25.56

Item VI: Taxes,—we understand this to be property and other taxes owed by decedent,—paid by the Swiss Executor, $15,211.99

(8) The estate is entitled Art. 9 (a), Regulation 68, to a credit for estate, inheritance, legacy, or succession taxes, to an amount paid, but not more than 25% of the Federal
9 Estate tax as ultimately determined.

The Commissioner in said deficiency letter has allowed a credit on this item of $6,009.85, being the amount of inheritance taxes paid to the State of Missouri only.

In so doing, he has erred in failing to take into account the following amounts paid to other states: Utah, $292.08; Connecticut, $74.00; New York, $103.12; New Jersey, $252.89; Virginia, $44.80. Total with Missouri, $6793.03.

(D) The Facts.

Assignment No. (1). The Transfer referred to in this assignment of error, consisted of a Trust Indenture made by decedent January 1, 1920, whereby he transferred, assigned and delivered to Mercantile Trust Company of St. Louis, in trust, certain bonds therein described, aggregating in their principal face amount $118,000.00, in trust to hold, manage and dispose of as an active trust, to pay the net income thereof to his daughter during her life. The indenture shows conclusively that the trust settlement thereby made, and the trust estate transferred, were made and transferred absolutely and irrevocably. The Grantor retained no power of revocation or alteration. He could do nothing to revoke or alter the fact that he had parted completely and irrevocably with the assets that constituted the trust estate. The only possible interest retained by him was a mere contingent remainder, the vesting of which depended upon the happening of contingencies over which he had absolutely no control, namely, the death of his daughter before his death, plus the then existence of the trust.

The trust was in existence at the date of testator's death, September 4, 1925, and his daughter then survived. These facts destroyed the possibility of any remainder ever vesting in the Grantor, said William J. Orthwein. It follows that at his death he had no taxable interest in this trust estate.

The attempted inclusion by the Commissioner of $34,544.06 as representing the trust estate at the time of decedent's death is contrary to the law and to Art. II, Regulation 78, then in force.

(2) Jointly Owned Property; Assignment No. (2).

The information held by Petitioners at this time, is not complete as to all the facts necessary to be known concerning this item. According to their present information the facts are, that several years before the death of decedent, he entered into a "Joint Account Agreement" with his daughter, by which certain property, valued at the time of his death at, to-wit, $41,946.25, was thereafter to be subject to said agreement as a joint account. According to Petitioner's present information the legal effect of said agreement was to create an estate in the nature of a joint tenancy between decedent and his daughter, with the right of survivorship.

If this information proves to be correct, then the entire title was vested at the time of decedent's death in his daughter and no part should be treated as a part of his estate.

If the legal effect of the facts, when fully known, is that decedent and his daughter each owned an undivided one-half interest in said Joint Account, then one-half only should be included within decedent's estate.

11 Petitioners have sent for authenticated copies of the contract itself, and for proofs of the other relevant facts, and are informed that said papers will reach them from Switzerland before the end of February, 1930, at which time they will be made available for the information of the Commissioner and of the Board of Tax Appeals.

(3) Assignments Nos. (3) to (8) inclusive.

The relative facts, so far as known to Petitioners, are sufficiently stated above in said assignments.

Petitioners are expecting to receive from Switzerland, before the end of February, 1930, authenticated copies of the relevant Probate Court records, and of the documents and other papers necessary to furnish the facts in detail and the proofs needed in relation to the Swiss estate.

These papers were ordered and a Swiss attorney employed to obtain them, and Petitioners are advised that the long delays of officials in Switzerland have prevented the papers being here in time for presentation to the Bureau before it became necessary to file this appeal.

Prayer for Relief.

Petitioners respectfully pray: that the above respective Assignments of Error be sustained; that the respective amounts alleged in said Assignments to have been erroneously included within said estate be excluded; that said re-

12 spective amounts, as to which the Commissioner is above alleged to have erred in not allowing them as deductions, be allowed as deductions; that said respective amounts, as to which it is above alleged that the Commissioner erred in not allowing them as credits, be allowed as credits; and that the tax be redetermined in accordance with the decision of the Board upon said various Assignments of Error, and that judgment be entered accordingly.

ST. LOUIS UNION TRUST COMPANY,
By H. J. Miller,
Asst. Trust Officer.

MERCANTILE-COMMERCE BANK & TRUST COMPANY,
By Joseph W. White,
Trust Officer.

Daniel N. Kirby,
Room 918 Security Building,
St. Louis, Missouri.

Arthur E. Kammerer,
411 North Seventh Street,
St. Louis, Missouri,
Counsel for St. Louis Union Trust Company.

Edgar H. McCulloch,
Counsel for Mercantile-Commerce
Bank & Trust Company,
c/o Mercantile-Commerce B. & T. Co.
St. Louis, Mo.

State of Missouri,
City of St. Louis—ss.

H. J. Miller, of lawful age, being duly sworn upon
13 oath, states that he is Assistant Trust Officer of St. Louis Union Trust Company, was Trust Officer of Liberty Central Trust Company, and has had personal charge for said trust companies of all of the administrations, (both probate and trust administrations), upon the estate of William J. Orthwein, of which said trust companies, or either of them, have at any time had charge. That he is personally familiar with all of the facts relating to the American administration of the will of William J. Orthwein, the decedent named in the foregoing petition, and has also conducted the correspondence that has been conducted by said trust companies, or either of them, with the Swiss executor of said will; and that the facts stated in the foregoing petition are true to the best of affiant's knowledge, information and belief.

H. J. MILLER.

Subscribed and sworn to before me this 20th day of February, 1930.

H. A. MAGOON,
(Notarial Seal) Notary Public.

My commission expires June 3rd, 1930.

State of Missouri,
City of St. Louis—ss.

Joseph W. White, of lawful age, being duly sworn upon oath, says that he is Trust Officer of the Mercantile-Commerce Bank & Trust Company, of St. Louis, Missouri, which

company joins as a petitioner in the foregoing petition
14 because it has had charge since the creation thereof, of the trust estate created by William J. Orthwein, the within named decedent, by his Trust Indenture therein mentioned as dated January 1, 1920; that affiant has personal knowledge of the creation of said trust and of the administration of said trust estate by the Mercantile Trust Company and by the Mercantile-Commerce Bank & Trust Company, its successor trustee.

That the facts stated in the foregoing petition in relation to said trust and trust estate are true to the best of affiant's knowledge, information and belief.

JOSEPH W. WHITE.

Subscribed and sworn to before me this 20th day of February, 1930.

NELLIE GROGAN,
(Notarial Seal) Notary Public.

My commission expires Dec. 28, 1930.

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15 (Answer of Commissioner of Internal Revenue.)

Filed April 23, 1930, United States Board of Tax Appeals.

The Commissioner of Internal Revenue, by his attorney, C. M. Charest, General Counsel, Bureau of Internal Revenue, in answer to the petition of the above-named taxpayers, admits and denies as follows:

(A). Denies so much of the paragraph of the petition designated (A) as alleges that The Swiss Bank Corporation took charge as domiciliary executor, and administered the estate under the jurisdiction of the "Court of Peace (Authority of Successions) of the Cercle of Montreux", and that the American administration was and is ancillary to that in Switzerland, and admits all other allegations contained in said paragraph of the petition designated (A).

(B) Admits so much of the paragraph of the petition designated (B) as alleges that the amount of the deficiency is Fifteen Thousand Five Hundred Sixty-five Dollars
16 and Eighteen Cents ($15,565.18), and that the nature of the tax is a Federal estate tax, and denies all other allegations contained in said paragraph of the petition designated (B).

(C) Denies that the respondent, in determining the deficiency tax, committed errors as alleged in the paragraph of the petition designated (C).

(D) (1). Admits so much of subdivision (1) of the paragraph of the petition designated (D) as alleges that the transfer referred to in this assignment of error consisted of a Trust Indenture made by decedent January 1, 1920, whereby he transferred, assigned and delivered to Mercantile Trust Company of St. Louis, in trust, certain bonds therein described, and that the trust was in existence at the date of testator's death, September 4, 1925, and his daughter then survived him, and denies all other allegations contained in said subdivision (1) of the paragraph of the petition designated (D).

(D) (2) and (3) Denies the allegations contained in subdivisions (2) and (3) of the paragraph of the petition designated (D).

(E) Denies each and every allegation contained in the petition not hereinbefore specifically admitted or denied.

Wherefore it is respectfully prayed that the determination of the Commissioner be approved.

(Signed) C. M. CHAREST,
General Counsel,
Bureau of Internal Revenue.

Of Counsel:
Frank T. Horner,
Special Attorney,
Bureau of Internal Revenue.

FTH/RFS/y 4/22/30

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17 (Amended Petition of St. Louis Union Trust Company, as Successor Trustee, etc., et al., for Appeal.)

Filed Aug. 10, 1932, U. S. Board of Tax Appeals.

United States Board of Tax Appeals.

St. Louis Union Trust Company, as successor trustee to Liberty Central Trust Company, as sole Residuary Legatee and Distributee of the American Estate of William J. Orthwein, deceased; joined by Mercantile-Commerce Bank & Trust Company, Successor trustee to Mercantile Trust Company, of the trust created by trust indenture of William J. Orthwein, dated January 1, 1920,
Petitioners,

Docket No. 47,633. vs.
Commissioner of Internal Revenue, Respondent.

(A) Jurisdiction. This appeal is from a proposed deficiency in Federal Estate Tax against the American estate of William J. Orthwein, First District of Missouri.

The "Liberty Central Trust Company," organized and doing business as a Trust Company under the laws of the State of Missouri, was named as Executor of the American Estate of William J. Orthwein, a citizen of the United States of America, who died in Switzerland, September 4, 1925, a resident of Switzerland, domiciled there, and who left a substantial estate consisting of: (a) Intangible personal property, (choses in action, stocks and bonds) a substantial part of which was evidenced by stock certificates located in the
18 United States, (chiefly in St. Louis, Missouri), representing shares of stock in corporations domestic to various of the United States; coupon bonds issued by the United States, by foreign governments, by corporations domestic to various of the United States, and possibly by states (or subdivisions thereof) of the United States; and choses in action (like bank balances, etc.) owed by persons or corporations in the United States.

He left no tangible personal property which was physically located in the United States or its possessions. (b) He left real estate (or interests therein) located in the United States, the value of which at date of death, was returned by the Executor and determined by the Bureau, at $2501.00.

His will appointed said Liberty Central Trust Company Executor as to his American estate. Said Liberty Central Trust Company probated, in the Probate Court, City of St. Louis, an authenticated copy of said will, and, pursuant to the laws of Missouri, thereupon duly received letters testamentary and took charge of, and administered said American estate under the jurisdiction of said Probate Court. The will appointed "La Société de Banque Swiss" (Swiss Bank Corporation) Branch of Lausanne, located at Lausanne, Switzerland, Executor as to all his estate except that in America. This Swiss Bank Corporation took charge as domiciliary Executor, and administered the foreign estate under the jurisdiction of the "Court of Peace (Authority of Successions) of the Cercle of Montreux." The American administration was and is ancillary to that in Switzerland. The foreign estate included both tangible and intangible personal prop-
19 erty, the value of which will be stated hereafter.

In due course said Liberty Central Trust Company as Executor, made final distribution of the residue of the estate to itself as trustee of the trust created by said will, and was

discharged as Executor. Thereafter, the "St. Louis Union Trust Company," a Trust Company organized and doing business under the laws of Missouri, succeeded the Liberty Central Trust Company as trustee of said trust, and took over the said trust estate. Consequently, the St. Louis Union Trust Company, as sole distributee of the residue of said probated estate is the legal successor in title and liability to said "Liberty Central Trust Company," Executor, and said trust estate in the hands of said St. Louis Union Trust Company as trustee, will have to pay any additional estate tax that may be assessed and therefore is one of the Petitioners herein.

The "Mercantile Commerce Bank and Trust Company," of St. Louis, Missouri, is successor trustee to "Mercantile Trust Company" of the trust created by Trust Indenture made by said William J. Orthwein, dated January 1, 1930, and it joins in this appeal because the Commissioner seeks to include within the estate of William J. Orthwein the assets that constituted the corpus of said last named trust estate.

(B) Amount, Etc., of Alleged Deficiency. The amount of the alleged deficiency as stated in the Sixty-day letter of the Commissioner (copy attached,) is Fifteen Thousand Five Hundred Sixty-five Dollars Eighteen Cents ($15,565.18), and the nature of the tax is a Federal Estate Tax. Petitioners are unable to state the exact amount of tax in controversy, but it will be such amount as rests upon the determination of the respective assignments of error herein set out.

(C) Assignments of Error.

(1) Since the filing of the original petition herein, a fundamental question of jurisdiction has arisen because of certain recent decisions of the Supreme Court of the United States, cited and culminating in its decision January 4, 1932, in the case of First National Bank of Boston vs. State of Maine, 76 Law Ed. (No. 5 Adv. Sheets, 1931 Term) p. 211.

Under the law as settled by these decisions the legal situs of intangible personal property, for the purpose of death transfer (estate) taxes, is at the residence or domicile of the decedent owner, not in any other jurisdiction where the evidences of ownership of such property may be located at the time of his death.

In the instant case, all of the property heretofore assumed by Petitioners and by Respondent to constitute "the American estate" of this decedent, except the above mentioned real estate items valued at $2501.00, consisted of intangible personal property, which under the above decision had its legal

situs for the purpose of the estate tax, in Switzerland where the decedent had his residence (domicile) at his death.

Therefore, said intangible property was not within the jurisdiction of the United States, which had no power through the Congress to levy an estate tax in respect of its transfer, and the attempt of Respondent to impose such a tax is in contravention of Amendment V to the Constitution of the United States.

21 The Respondent therefore erred in attempting to impose a tax in respect of any of said "American estate" except said real estate.

Whether the Board of Tax Appeals does or does not sustain this Assignment (1), the following Assignments of Error are urged, the nature and amounts being changed as compared with those stated in the original petition herein, to conform to all of the evidence now on hand, including the substantial additional facts shown by the voluminous documents received from Switzerland since the sixty day letter was issued.

(2) Under the title "Transfers", the Commissioner erroneously treats as part of the estate, what is described in the statement attached to the notice of deficiency as "Remainder Value of Property Transferred in Trust $34,544.06".

This item covers the above mentioned trust estate created by Trust Indenture made by decedent January 1, 1920, whereby he transferred and delivered absolutely and irrevocably to the Mercantile Trust Company, as trustee, the assets in the above amounts that are now erroneously sought by the Commissioner to be treated as assets of decedent at the time of his death. All of the assets of said trust estate consisted at the date of decedent's death, of intangible personal property.

Said conclusion of the Commissioner is contrary to the expressed provision of Article XI, Regulations 68, and is contrary to the facts and to the law under the facts. The remainder of said assets may not validly be included in the estate of decedent.

22 (3) The Commissioner erred in respect of the item entitled "Jointly Owned Property, Items 1 to 5 inclusive," returned at Forty-one Thousand Nine Hundred Fifty-six Dollars Twenty-five Cents ($41,956.25), determined at Eighty-four Thousand Three Hundred Fifty Dollars ($84,350.00) as shown in said notice of deficiency, in treating Item 1 thereof as taxable at all.

The evidence now at hand shows that Item 1 of "Jointly Owned Property," being three hundred shares of stock in Gillette Safety Razor Company, a corporation organized in the United States, returned at $25,462.50, belonged to decedent's daughter, and, therefore, said amount should be deducted from the item representing the gross estate in the United States.

Petitioners withdraw their original assignments of error as to Items 2-5 inclusive of "Jointly Owned Property" as set out in their original assignment of errors, and limit this assignment to the error of Respondent in treating said three hundred shares of "Gillette" stock as a part of the estate.

(4) The gross estate of decedent, outside of the United States, had a total value at the date of decedent's death, of $277,635.59; and the Respondent erred in not so finding.

(5) The Executors have expended the following amounts on account of administration expenses and claims against the estate, a percentage of all of which items, not to exceed ten per cent of the value of the gross American Estate, should be deducted from said gross estate in determining the net American Estate, to-wit:

23	(A)	Funeral Expenses,	$ 11,375.22
	(B)	Executors' Commissions,	23,308.66
	(C)	Attorneys' Fees,	7,500.00
	(D)	Miscellanous Administration Expenses,	1,007.40
	(E)	Debts,	76,637.98
	(F)	Taxes,	21,531.84
		Total,	$141,361.10

The Respondent erred in not making said deduction.

(6) The estate has paid State inheritance taxes amounting to $6793.03, and is entitled to a credit against the Federal Estate Tax in the amount thereof but not to exceed twenty-five per cent of the estate tax.

The Respondent erred in not allowing such credit.

(7) The gross estate heretofore considered as within the United States (also herein called the "American Estate"), had a value at decedent's death, of $612,815.29.

This does not include:

The value of said 300 shares of stock in Gillette Razor Co., found to be the property of decedent's daughter,	$25,462.50
The remainder value of said assets transferred in trust, the propriety of including which is herein disputed by Petitioners,	34,544.06
Total of said two excluded items,	$60,006.56

The Respondent erred in not so finding.

(Explanatory note: It should be stated in connection with the foregoing assignments of error, that at the time of said sixty-day Bureau letter, many of the facts necessary to have enabled the Respondent to make correct findings in relation to most of said items, were not before him, having been learned later by Petitioners after the date of said letter, through their later experience and investigations in relation to the foreign (domiciliary) estate and records).

24 (D) The Facts.

Assignment No. (1). Decedent died in Territet, Switzerland, September 4, 1925. He was a citizen of the United States, but had established and then had his residence and domicile at Territet, in Switzerland.

He left a substantial estate that has heretofore been designated the "American Estate" consisting of the classes of property heretofore mentioned in Subdivision (A) hereof, under the title "Jurisdiction", to which reference is hereby made. He left no tangible personal property which was physically located in the United States, or its possessions. He left real estate, or interests therein, located in the United States, the value of which at the date of death was returned by the Executors and determined by the Bureau at $2501.00.

He also left a foreign estate which included both tangible and intangible personal property, the gross value of which as above stated, was $277,635.59. The foreign estate included stocks in various foreign corporations, also various bonds and other choses in action.

In dealing with the estate, the Respondent and the Executors have heretofore proceeded on the mistaken assumption that for the purpose of the estate tax, the legal situs of all shares of stock in corporations organized in any of the states of the United States, and of all bonds physically located in the United States, and of other choses in action, like bank credit balances, etc. owed by debtors in the United
25 States, was within the United States, and, therefore, subject to the jurisdiction of Congress, and to the Estate Tax Act.

Petitioners hereby refer to the other facts relating to this point stated elsewhere in this amended petition.

The foreign estate paid a substantial succession tax (209,202 Swiss francs) to the Swiss Governmental taxing authorities.

Recent decisions of the Supreme Court of the United States above mentioned show that said assumption was incorrect in fact and law.

The Petitioners, therefore, respectfully contend, that the doctrines theretofore generally understood to obtain in the United States in respect of the legal situs for the purpose of succession and other taxes, of intangible personal property, have been completely overthrown by the decisions of the Supreme Court of the United States in the case of First National Bank of Boston vs. State of Maine, 76 Law Ed. (No. 5. Adv. Sheets, 1931 Term) p. 211, and in the other cases therein cited.

Petitioners respectfully contend that this new doctrine having thus become the established law of the United States, it follows that all of the intangible personal property heretofore erroneously assumed by Petitioners and by Respondent to constitute the "American Estate" of this decedent had its legal situs for the purpose of estate taxes, in Switzerland where the decedent had his residence and domicile at the date of his death; that said intangible personal property was not within the jurisdiction of the United States, which had no
26 power through Congress to levy an estate tax in respect of its succession or transfer, and that the attempt of Respondent to impose such a tax is in contravention of Amendment V to the Constitution of the United States, as an attempt by the United States to deprive the owners thereof, of property, without due process of law.

Assignment No. (2). The Transfer referred to in this assignment of error, consisted of a Trust Indenture made by

decedent January 1, 1930, whereby he transferred, assigned and delivered to Mercantile Trust Company of St. Louis, in trust, certain bonds therein described, then aggregating in their principal face amount $118,000.00 and having a value at the date of decedent's death, of $101,421.24. This transfer was in trust to hold, manage and dispose of as an active trust, to pay the net income thereof to his daughter Alma Feraldo, during her life. She was born February 1, 1891. The Indenture shows conclusively that the trust settlement thereby made, and the trust estate transferred, were made and transferred absolutely and irrevocably. The Trust Indenture expressly declared the intent of the grantor (decedent) to make "an absolute and irrevocable gift and settlement of the property hereinafter described, so that the grantor shall during the life of his said daughter have no further individual or beneficial interest therein." The grantor retained no power of revocation or alteration. He could do nothing to revoke or alter the fact that he had parted completely and irrevocably with the assets that constituted the trust estate. The only possible interest retained by him was a mere contingent remainder, the vesting of which depended upon the happening of contingencies over which he had absolutely no control, namely, the death of his daughter before his death, plus the then existence of
27 the trust.

The trust was in existence at the date of testator's death, September 4, 1925, and his daughter then survived. These facts destroyed the possibility of any remainder ever vesting in the grantor, said William J. Orthwein. It follows that at his death he had no taxable interest in this trust estate.

The attempted inclusion by the Commissioner of $34,344.96 as representing the remainder value of the trust estate at the time of decedent's death is contrary to the law and to Art. II, Regulation 78, then in force.

(3) Jointly Owned Property: Assignment No. (3).

The 300 shares of stock in Gillette Safety Razor Company that alone are now covered by this assignment, were represented at the date of decedent's death by a stock certificate issued in the name of decedent's daughter Alma Feraldo, which stock certificate was on deposit in her name, with the Swiss bank ("Societe de Banque Swisse.") Neither this certificate nor its deposit had any relation to the estate of decedent. It was the individual property of said Alma Feraldo.

The Estate Tax Return was filed by the American Executor before it knew the actual facts and was based upon mistaken information as to this item of Gillette stock, also as to four additional items (2 to 5 inclusive) of stock in other American corporations, which items were also returned under the title "Jointly Owned Property."

The facts as to these other four items (2 to 5), consisting of 500 shares in Armour Company, A stock; 500 shares in Armour Company, B stock; 500 shares in Gimbel Bros. and 100 shares in U. S. Steel Co., common, are merely that as assets of decedent, they should have been included in the
American Estate being stocks in corporations in
28 states of the United States.

Assignment No. (4). The facts so far as relevant in support of this assignment have already been stated in Assignment (4), to which reference is here made.

Assignment No. (5). The facts as to the nature and amounts of payments made by the estate for administration expenses and for claims against (debts of) the estate have already been stated in Assignment (5), to which reference is hereby made.

Assignment No. (6). A similar situation obtains as to the facts relevant to Assignments (6) and (7). In each instance reference is hereby made to the facts then stated.

Prayer for Relief.

Petitioners respectfully pray: that the above respective Assignments of Error be sustained; that the respective amounts alleged in said Assignments to have been erroneously included within said estate be excluded therefrom; that said respective amounts, as to which the Respondent is above alleged to have erred in not allowing them as deductions, be allowed as deductions; that said respective amounts, as to which it is above alleged that the Respondent erred in not allowing them as credits, be allowed as credits; and that the tax be redetermined in accordance with the decision of the Board upon said various Assignments of Error, and that judgment be entered accordingly.

ST. LOUIS UNION TRUST COMPANY,
By H. J. Miller, Trust Officer.

MERCANTILE-COMMERCE BANK & TRUST COMPANY,
By Thos. C. Hennings, Vice Pres.

Daniel N. Kirby,
Address, Room 918 Security Bldg.,
St. Louis, Missouri.
Counsel for St. Louis Union Trust Company.

29 Joseph W. White,
Address, 411 North Seventh St.,
St. Louis, Missouri.
Counsel for Mercantile-Commerce
Bank & Trust Company.

State of Missouri,
City of St. Louis—ss.

H. J. Miller, of lawful age, being duly sworn upon oath, states that he is Trust Officer of St. Louis Union Trust Company, was Trust Officer of Liberty Central Trust Company, and has had personal charge for said trust companies of all of the administrations, (both probate and trust administration), upon the estate of William J. Orthwein, of which said trust companies, or either of them, have at any time had charge. That he is personally familiar with all of the facts relating to the American administration of the will of William J. Orthwein, the decedent named in the foregoing petition, and has also conducted the correspondence that has been conducted by said trust companies, or either of them, with the Swiss executor of said will; and that the facts stated in the foregoing petition are true to the best of affiant's knowledge, information and belief.

H. J. MILLER.

Subscribed and sworn to before me this 3rd day of August, 1932.

My Commission expires June 3, 1934.

ALLAN DUNBAR,
Notary Public.

(Notarial Seal)

State of Missouri,
City of St. Louis—ss.

30 Thos. C. Hennings, of lawful age, being duly sworn upon oath, says that he is Vice President of the Mercantile-Commerce Bank & Trust Company, of St. Louis, Missouri, which company joins as a petitioner in the foregoing petition because it has had charge since the creation thereof, of the trust estate created by William J. Orthwein, the within named decedent, by his Trust Indenture therein mentioned as dated January 1, 1920; that affiant has

personal knowledge of the creation of said trust and of the administration of said trust estate by the Mercantile Trust Company and by the Mercantile-Commerce Bank & Trust Company, its successor trustee.

That the facts stated in the foregoing petition in relation to said trust and trust estate are true to the best of affiant's knowledge, information and belief.

THOS. C. HENNINGS.

Subscribed and sworn to before me this 4th day of August, 1932.

My commission expires Jan. 6, 1935.

NELLIE GROGAN,
Notary Public.

(Notarial Seal)

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31 (Copy of Deficiency Letter)

Treasury Department

Washington

Office of
Commissioner of Internal Revenue

Dec. 27, 1929.

MT-ET-Cl. NR-14321-JEK
District of 1st Missouri
Estate of William J. Orthwein
Date of death—September 4, 1925.

St. Louis Union Trust Company, Executor,
Estate of William J. Orthwein,
St. Louis, Missouri.

Sirs:

The Bureau has examined the protest filed on behalf of the above named estate against the tentative findings set forth in the letter addressed to the executor by this office under date of November 11, 1929. The deficiency in Federal estate tax hereby determined amounts to $15,565.18, and is fully explained in the attached statement, consisting of pages, showing the action of the Bureau with respect to the protest.

In accordance with the provisions of Title III of the Revenue Act of 1926, you are allowed sixty days from the date of the mailing of this letter (not counting Sunday as the sixtieth day) within which to file a petition with the United States Board of Tax Appeals for a redetermination of the deficiency.

Any such petition must be addressed to the United States Board of Tax Appeals, Earle Building, Washington, D. C., and must be mailed in time to reach the said Board within the 60 day period prescribed.

Where a taxpayer has been given an opportunity to file a petition with the United States Board of Tax Appeals and has not done so within the 60 days prescribed, and an assessment has been made, or where a taxpayer has filed a petition and an assessment in accordance with the decision, which has become final, has been made, the unpaid amount of such assessment must be paid upon notice and demand from the Collector of Internal Revenue. No claim for abatement can be entertained.

If you acquiesce in this determination and do not desire to file a petition with the United States Board of Tax Appeals, you are requested to execute the enclosed Form 890, waiving (1) your right to file a petition with the United States Board of Tax Appeals and (2) the restrictions on the assessment and collection of such deficiency, and to forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of the Estate Tax Division, Miscellaneous Tax Unit. In the event that you acquiesce in only a part of the determination, the enclosed form of waiver should be executed with respect to the amount of the deficiency to which you agree.

Respectfully,

(Signed) H. F. MIRES,
Acting Commissioner.

Enclosures:
Statement,
Waiver—Form 890

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32 MT-ET-Cl-Nr-14321-JEK-1st Missouri
Estate of William J. Orthwein

The estate's protest arises in connection with the following items.

Gross Estate

Stocks and Bonds	Returned	Tentatively Determined	Determined
20 shares Ely U. Walker Dry Goods Company, 1st preferred	$ 0.00	$ 2,120.00	$ 0.00
27 shares National Lead Company, preferred	0.00	3,121.88	0.00
Dividend thereon	0.00	47.25	0.00

Jointly Owned Property			
Items 1 to 5, inclusive	41,956.25	84,350.00	84,350.00
Transfers			
Remainder value of property transferred in trust	0.00	34,544.06	34,544.06
Deductions			
Total claimed	41,122.58	0.00	0.00

It has been established by evidence presented in connection with the estate's protest that decedent was not the owner of the securities described above under "Stocks and Bonds". The value tentatively included for tax has been eliminated in this adjustment.

Nothing has been presented which warrants the Bureau in changing its action in taxing the full value of the property described in the return under Items 1 to 5, inclusive of "Jointly Owned Property" nor with respect to the inclusion for tax of the remainder value of the property transferred in trust by decedent prior to his death.

In the tentative audit no deductions whatever were allowed, as the estate failed to comply with the requirements of Article 52, Regulations 70. As nothing has been submitted which warrants any change in that action, no adjustment is herein made.

As the requirements of Article 9, Regulations 70, relative to credit for State inheritance taxes has been complied with as respects the taxes paid to the State of Missouri, credit in the amount paid has herein been allowed.

The following computation shows the estate tax liability of the estate, which is hereby made final:

33

	Returned	Tentatively Determined	Determined
	$	$	$
Gross estate	411,225.82	678,110.98	672,821.85
Deductions	41,122.58	0.00	0.00
Net estate	370,103.24	678,110.98	672,821.85
Tax liability	11,304.13	27,186.66	26,869.31
Deficiency		15,882.53	15,565.18

Tax liability	$26,869.31
Credit for State inheritance taxes paid	6,009.85
Tax less credit	20,859.46
Returned tax less allowable credit	8,478.10
Amount proposed for assessment	$12,381.36

The amount proposed for assessment will bear interest at the rate of six per centum per annum from one year after decedent's death to the date of assessment, or to the thirtieth day after the filing of a waiver of the restrictions on the assessment, whichever is the earlier.

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34 (Answer of Commissioner of Internal Revenue to Amended Petition for Appeal.)

Filed Oct. 5, 1932, United States Board of Tax Appeals.

The Commissioner of Internal Revenue, by his attorney, C. M. Charest, General Counsel, Bureau of Internal Revenue, in answer to the amended petition of the above-named taxpayer, admits and denies as follows:

(A) Denies so much of the paragraph of the amended petition lettered (A) as alleges that the decedent left no tangible personal property which was physically located in the United States or its possessions; that the American administration was and is ancillary to that in Switzerland; and admits all other allegations contained in said paragraph of the amended petition lettered (A).

(B) Admits the allegations contained in the paragraph of the amended petition lettered (B).

(C) (1) and (2) Denies the allegations contained in subdivisions (1) and (2) of the paragraph of the amended petition lettered (C).

35 (C) (3), (4), (5), (6) and (7). Admits the allegations contained in subdivisions (3) to (7), inclusive, of the paragraph of the amended petition lettered (C).

(D) Assignment No. (1). Admits so much of the subdivision designated "Assignment No. (1)" under the paragraph of the amended petition lettered (D), as alleges that decedent died in Territet, Switzerland, September 4, 1925; that he was a citizen of the United States, but had established and then had his residence and domicile at Territet, in Switzerland; that he left a substantial estate that has heretofore been designated the "American Estate"; that he left real estate in the United States, the value of which, at the date of death, was returned by the executors and determined by the Bureau at $2,501.00; that he also left a foreign estate which included both tangible and intangible personal property, the gross value of which, as above stated, was $277,635.59, and denies all other allegations contained in said subdivision designated "Assignment No. (1)", under the paragraph of the amended petition lettered (D).

(D) Assignment No. (2). Admits so much of the subdivision designated "Assignment No. (2)", under the paragraph of the amended petition lettered (D), as alleges that the transfer referred to in this assignment of error, consisted of a Trust Indenture made by the decedent January 1, 1930, whereby he transferred, assigned and delivered to Mercantile Trust Company of St. Louis, in trust, certain bonds therein described, then aggregating in their principal face amount $118,000.00, and having a value at the date of decedent's
36 death of $101,421.24; that Alma Feraldo was born February 1, 1891; that the trust was in existence at the date of testator's death, September 4, 1925, and his daughter then survived, and denies all other allegations contained in said subdivision designated "Assignment No. (2)", under the paragraph of the amended petition lettered (D).

(D) (3) to (6). Admits the allegations contained in subdivisions designated Assignment No. (3) to (6), inclusive, of the paragraph of the amended petition lettered (D).

(E) Denies each and every allegation contained in the amended petition not hereinbefore specifically admitted or denied.

Wherefore it is respectfully prayed that the determination of the Commissioner be approved.

(Signed) C. M. CHAREST,
General Counsel, Bureau
of Internal Revenue.

Of Counsel:
Frank T. Horner,
Special Attorney,
Bureau of Internal Revenue.
RFS/y 10/4/32

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37 (Opinion of United States Board of Tax Appeals.)

United States Board of Tax Appeals.

St. Louis Union Trust Company, as Successor Trustee to Liberty Central Trust Company, as Sole Residuary Legatee and Distributee of the American Estate of William J. Orthwein, Deceased; Joined by Mercantile Commerce Bank & Trust Comapny, Successor Trustee to Mercantile Trust Company, of the Trust Created by Trust Indenture of William J. Orthwein, Dated January 1, 1920, Petitioners,
Docket No. 47633. vs.
Commissioner of Internal Revenue, Respondent.

Promulgated May 16, 1933.

1. The decedent, who died a nonresident of the United States on September 4, 1925, created a trust fund January 1, 1920, the income of which was to be paid to his daughter for life, with remainder over. The instrument provided that if the daughter died prior to the decedent the principal of the fund should be paid to him. Held, the value of the remainder interest was not includable in decedent's gross estate.

2. At the date of his death the decedent owned property located in the United States consisting of shares of stock, bonds, etc., the symbolical evidences of which were located in the United States. Held, the value of such property constituted part of the decedent's gross estate.

Daniel N. Kirby, Esq., for the petitioners.

Ralph F. Staubly, Esq., for the respondent.

This proceeding is for the redetermination of a deficiency in estate tax of $15,565.18. The deficiency was determined against the American estate of William J. Orthwein, who died a nonresident of the United States.

Certain issues raised by the pleadings respecting the taxability of jointly owned property, the allowance of deductions on account of administration expenses and debts of the decedent, and the allowance or credit on account of inheritance taxes paid, have been disposed of by a stipulation of facts filed. The issues presented for the determination of the Board are:

(1) Where the decedent, a nonresident, places property in trust with a domestic corporate trustee, consisting of shares of stock in domestic corporations and foreign and domestic bonds, to pay the income to his daughter for life, the
38 remainder to be distributed according to the provisions of the trust instrument but in the event of the daughter predeceasing the decedent the property to revert to the grantor, is the value of the property in excess of the value of the life estate of the daughter subject to be included in the decedent's gross estate pursuant to the provisions of section 302 (c) of the Revenue Act of 1924?

(2) Should the value of (a) shares of stock in domestic corporations, (b) domestic bonds, and (c) foreign bonds, the symbolical evidences of which were physically located in the United States at the date of the decedent's death, be included in the gross estate of the nonresident decedent pursuant to the provisions of section 302 (a) of the Revenue Act of 1924?

Findings of Fact.

The decedent, William J. Orthwein, a citizen of the United States, died in Switzerland, September 4, 1925, then a resident of, and domiciled in, Switzerland.

The decedent left a will dated and executed at Territet, Switzerland, November 28, 1923, by which he appointed the Liberty Central Trust Co. of St. Louis, Missouri, executor of his American estate, i. e., "All that relates to my American Affairs," and "La Societe de Banque Swisse" (Swiss Bank Corporation), branch of Lausanne, executor of the rest of his estate wherever situated.

The Swiss Bank Corporation, as such foreign executor, took charge of and administered the estate outside of the United States.

The American administration was conducted in the Probate Court, City of St. Louis, Missouri, where an authenticated copy of the will was filed and Liberty Central Trust Co. was appointed executor d. b. n. on March 16, 1926.

The Liberty Central Trust Co. as executor, made final distribution of the residue of the estate to itself as trustee of the trust created by the will and was discharged as executor. Thereafter the St. Louis Union Trust Co., a trust company organized and doing business under the laws of Missouri, succeeded the Liberty Central Trust Co. as trustee of the trust and took over the trust estate. Consequently, the St. Louis Union Trust Co., as sole distributee of the residue of said probated estate, is the legal successor in title and liability to the Liberty Central Trust Co., executor, and said trust estate in the hands of said St. Louis Union Trust Co. as trustee will have to pay any additional estate tax that may be assessed, and therefore is one of the petitioners herein.

The Mercantile Commerce Bank & Trust Co. of St. Louis, is successor trustee to Mercantile Trust Co. of the trust created by trust indenture made by William J. Orthwein,
39 the decedent, dated January 1, 1920, and it joins in this proceeding because the respondent seeks to include within the estate of William J. Orthwein the assets that constituted the corpus of the last named trust estate.

The decedent left a substantial estate, hereinafter referred to as the American estate, consisting of:

(a) Personal property (choses in action, stocks and bonds), a substantial part of which was evidenced by: stock certificates located in the United States (chiefly in St. Louis,

Missouri), evidencing shares of stock in corporations domestic to various of the United States; coupon bonds that were physically located in the United States, issued by the United States, by foreign governments, by corporations, public and private, which are domestic to various of the United States; and choses in action (like bank balances, etc.) owed by persons or corporations located in the United States.

As to the securities held by the Liberty Central Trust Co.: When decedent, having retired from business, moved his place of residence to Switzerland, he turned over these securities to the German Savings Institution (predecessor of the Liberty Central Trust Co.) with which he then and thereafter (until his death) conducted a deposit account. He gave no power of attorney to the bank, but told its officer with whom he made the arrangement that he had instructed or would instruct the corporations which had issued the shares of stock thus turned over and which stood in his name, to mail to the bank the dividend checks thereon, which would be payable to him, so that the bank might deposit such checks, together with the interest coupons on the bonds that were also turned over, to the credit of decedent's deposit account with the bank. Pursuant to this arrangement, the bank received the income from these securities and credited it, together with other deposits made by the decedent, to him on his deposit account with the bank. The bank neither had nor exercised any power of control, sale or management over these securities. They were held subject to the order of decedent. The same situation or relation existed between the Trust Co. and decedent, except that a year or so before decedent's death he borrowed money from the Trust Co., which was credited to his deposit account, and he gave the Trust Co. either his collateral note or its equivalent which gave the Trust Co. a lien on the securities for the payment of this debt. At decedent's death the unpaid principal of this debt was about $16,000.

The personal property thus in the keeping of the Trust Co. consisted of the items of stocks and bonds in schedule (b) of the Federal estate tax return.

As to the securities held in New York City, these stock certificates and bonds never came into the possession of the American executor, although it endeavored to obtain them. They were held in New York until under the control of the Swiss Bank Corporation at the date of decedent's death. Accordingly they were not included in the Trust Co.'s inventory or estate tax return, except five items of stocks in American corporations which were included in the

estate tax return as "jointly owned property" and treated in the deficiency notice attached to the amended petition at their full (not their one-half) value.

They were inventoried and otherwise treated by the foreign executor as among the assets held by it and as "in New York."

The above securities, physically located in New York City, in the custody of a New York banking house at decedent's death, have not heretofore, for the purpose of administration, been treated as part of the American estate.

(b) Real estate (or interests therein), located in the United States, the reasonable, fair value of which at the date of death was $2,501, the amount at which it was returned by the executor and determined by the respondent.

The gross foreign estate of the decedent (outside of the United States) included both tangible and intangible personal property having a total value at the date of decedent's death of $277,635.59.

On January 1, 1920, by his trust indenture, the decedent transferred various securities to the Mercantile Trust Co. of St. Louis, in trust to hold, manage, and dispose of as an active trust and to pay the net income thereof to the decedent's daughter, Alma Feraldo, during her life and upon her death for disposition as provided in the trust indenture.

The trust indenture contained a provision that if the daughter predeceased the grantor the trust should terminate and the trust estate should be paid over to the grantor, if living. The trustee of the trust was given discretionary power to terminate the trust deed "at such time as the trustee may deem it wise that the trust be terminated."

The daughter was born February 1, 1891. She did not predecease the decedent but survived him and the trust is still alive. The value of the trust securities at the date of the decedent's death, including accrued income thereon, was $101,421.24 and an agreed value at decedent's death of the reversionary interest in the trust corpus subject to the daughter's life estate is $34,544.06. The respondent in determining the deficiency claimed included said reversionary interest in the gross estate at a value of $34,544.06.

The gross estate heretofore considered as within the United States had a value at date of decedent's death of $612,815.29. This is exclusive of $25,462.50, the value of 300 shares of stock

in Gillette Razor Co. included in the gross estate by the
41 respondent but later found to be the property of decedent's daughter, and also of the remainder value of the trust estate of $34,544.06.

Opinion.

Smith: The first question for the determination of the Board is the propriety of including in the gross estate the value of the reversionary interest of the decedent in the trust estate. There is no contention on the part of the respondent that the value of this reversionary interest of $34,544.06 should be included in the gross estate upon the ground that the trust was created in contemplation of death. It is contended, however, that the amount should be included in the gross estate under section 302 of the Revenue Act of 1924, which, so far as pertinent, reads as follows:

Sec. 302. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—

(a) To the extent of the interest therein of the decedent at the time of his death which after his death is subject to the payment of the charges against his estate and the expenses of its administration and is subject to distribution as part of his estate;

* * * * * * *

(c) To the extent of any interest therein of which the decedent has at any time made a tranfer, or with respect to which he has at any time created a trust, in contemplation of or intended to take effect in possession or enjoyment at or after his death, except in case of a bona fide sale for a fair consideration in money or money's worth. Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death without such a consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of Part I of this title.

The trust indenture expressly declared the intention of the decedent grantor to make "an absolute and irrevocable gift and a settlement of the property hereinafter described, so that the grantor shall, during the life of his said daughter, have no further individual or beneficial interest therein." The grantor retained unto himself no power of revocation or

alteration. The only power to end the trust during the life of the grantor rested in the trustee alone. The decedent could do nothing to alter the fact that he had parted irrevocably with the trust estate. The only possibility of his ever reacquiring an interest in the trust property depended upon the happening of certain contingencies which in fact never happened; viz., (1) a termination of the trust by the trustee during decedent's life; or (2) the death of his daughter, the life tenant, before his death plus the then existence of the trust.

42 His daughter survived him and the trust is still alive, so the contingencies upon which he might have reacquired the property never happened. At his death, his daughter still being alive, the decedent "had no further individual or beneficial interest" in the trust estate which would or could pass by his death.

The power of termination given to the trustee alone did not render the remainder subject to the tax. The decedent of his own volition had no power to terminate the trust and the power of the trustee gave him no control over the termination thereof. White vs. Erskine, 47 Fed. (2d) 1014; McCormick vs. Burnet, 283 U. S. 784; Lillian M. Wheeler, Executrix, 20 B. T. A. 695; Colonial Trust Co. et al., Executors, 22 B. T. A. 1377.

The provision of the trust instrument that upon the prior death of the daughter, the life tenant, the trust estate should revert to the grantor, the decedent herein, did not render the value of the reversionary interest a part of the decedent's gross estate. The situation here is parallel to that which obtained in May vs. Heiner, 281 U. S. 238, in which the court said:

The transfer of October 1st, 1917, was not made in contemplation of death within the legal significance of those words. It was not testamentary in character and was beyond recall by the decedent. At the death of Mrs. May no interest in the property held under the trust deed passed from her to the living; title thereto had been definitely fixed by the trust deed. The interest therein which she possessed immediately prior to her death was obliterated by that event.

To the same effect is Cyrus H. McCormick et al., Executors, 13 B. T. A. 423; affd., McCormick vs. Burnet, 283 U. S. 784; Nanaline H. Duke et al., Executors, 23 B. T. A. 1104; affd., C. C. A., 3d Cir., Jan. 10, 1933. Cf. H. Seldon Taylor, Jr., et al., Executors, 27 B. T. A. 220; Elizabeth B. Wallace, Ex-

ecutrix, 27 B. T. A.—. The contention of the petitioners upon this point is sustained.

The second point for determination of the Board is the inclusion in the gross estate of the value of bonds, certificates for shares of stock, etc., physically located in the United States but belonging at the date of death of the decedent to a nonresident alien. The contention of the petitioners upon this point is not sustained. The decision of the Supreme Court in Burnet vs. Brooks,—U. S.—, decided March 13, 1933, is dispositive of this issue.

Reviewed by the Board.

Judgment will be entered under Rule 50.

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43 (Order of Redetermination, December 16, 1933.)

United States Board of Tax Appeals.

Washington.

St. Louis Union Trust Company, as Successor to Liberty Central Trust Company, as Sole Residuary Legatee and Distributee of the American Estate of William J. Orthwein, Deceased; Joined by Mercantile Commerce Bank & Trust Company, Successor Trustee to Mercantile Trust Company, of the Trust Created by Trust Indenture of William J. Orthwein, Dated January 1, 1920, Petitioners,

Docket No. 47633. vs.

Commissioner of Internal Revenue, Respondent.

Pursuant to the findings of fact and opinion of the Board in the above-entitled proceeding promulgated May 16, 1933, the respondent, on November 25, 1933, filed a notice of proposed redetermination. Hearing was had thereon on December 13, 1933, at which time there was no appearance for the petitioner and the proposed redetermination of the respondent was uncontested. Wherefore, it is—

Ordered and Decided that there is no deficiency in estate tax due from the petitioner.

CHARLES P. SMITH,
Member.

Enter:
Entered
Dec. 16, 1933.

(Seal)
C.P.S.:aa.

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44 (Petition of Guy T. Helvering, Commissioner, for Review of Decision of United States Board of Tax Appeals.)

Filed March 3, 1934, U. S. Board of Tax Appeals.

In the United States Circuit Court of Appeals for the Eighth Circuit.

Guy T. Helvering, Commissioner of Internal Revenue, Petitioner,

B. T. A. Docket No. 47633. vs.

St. Louis Union Trust Company, as Successor Trustee to Liberty Central Trust Company, as sole Residuary Legatee and Distributee of the American Estate of William J. Orthwein, Deceased; joined by Mercantile Commerce Bank & Trust Company, Successor Trustee to Mercantile Trust Company, of the Trust created by Trust Indenture of William J. Orthwein, dated January 1, 1920, Respondents.

To the Honorable Judges of the United States Circuit Court of Appeals for the Eighth Circuit:

Now comes Guy T. Helvering, Commissioner of Internal Revenue, by his attorneys, Frank J. Wideman, Assistant Attorney General, E. Barrett Prettyman, General Counsel, Bureau of Internal Revenue, and Frank T. Horner and Ralph P. Staubly, Special Attorneys, Bureau of Internal Revenue, and respectfully shows:

I.

That he is the duly appointed, qualified and acting Commissioner of Internal Revenue, appointed and holding office by virtue of the laws of the United States; that the St. Louis Union Trust Company of St. Louis, Missouri, is the successor to the Liberty Central Trust Company, testamentary trustee under the last Will and Testament of the decedent, William J. Orthwein; that the Liberty Central Trust Company was named as executor under the Will of the decedent, qualified as such, and thereafter distributed the residuary estate to itself as testamentary trustee, whereupon it was discharged as executor of the decedent's Will; that the Mercantile Commerce Bank & Trust Company of St. Louis, Missouri, successor to the Mercantile Trust Company, is trustee under the trust indenture executed by the decedent under date of January 1, 1920; that the decedent, William J. Orthwein, died a resident of Switzerland, on September 4, 1925; that the estate tax return made on behalf of the dece-

45

dent's estate was filed with the Collector of Internal Revenue for the 1st District of Missouri, whose office is located in St. Louis, Missouri, which is within the jurisdiction of the United States Circuit Court of Appeals for the Eighth Judicial Circuit.

That the Court in which the review of this proceeding is sought is the United States Circuit Court of Appeals for the Eighth Circuit.

II.

The nature of the controversy is as follows, to-wit:

The decedent, William J. Orthwein, died September 4, 1925, a resident of Switzerland; thereafter the residuary estate of the decedent was transferred to the St. Louis Union Trust Company as trustee of the testamentary trust created under the provisions of the decedent's will, and is now acting in such fiduciary capacity; that the Mercantile Commerce Bank & Trust Company is the successor to the Mercantile
46 Trust Company, trustee under the trust indenture executed by the decedent on January 1, 1920, and is now acting in such fiduciary capacity; the estate tax return filed on behalf of the decedent's estate disclosed a tax liability of $8,478.10.

In making the return on behalf of the decedent's estate, for Federal estate tax purposes, the executor of the decedent's will did not include any part of the corpus of the trust of January 1, 1920, in the decedent's gross estate.

Under date of December 27, 1929, the Commissioner of Internal Revenue sent a notice to the St. Louis Union Trust Company, of St. Louis, Missouri, as executor, asserting a deficiency in the estate tax upon the transfer of the net estate of the decedent in the amount of $15,565.18. In determining the deficiency in the estate tax, the Commissioner included in the decedent's gross estate the value of the reversionary interest of the decedent in the corpus of the said trust of January 1, 1920, pursuant to the provisions of Section 302 (c) of the Revenue Act of 1924, as the subject of a transfer made by the decedent which was intended to take effect in possession or enjoyment at or after the decedent's death, to the extent of such reversionary interest.

Under date of February 24, 1930, the St. Louis Union Trust Company, as successor to the Liberty Central Trust Company, as testamentary trustee of the decedent's residuary estate, which said company was the former executor of the

decedent's Will, together with the Mercantile Commerce Bank & Trust Company, successor trustee under the trust executed by the decedent on January 1, 1920, filed a petition with the United States Board of Tax Appeals for a redeter-
47 mination of the estate tax deficiency above-mentioned. After the answer of the Commissioner was duly filed, the case was submitted to the Board of Tax Appeals for decision on the basis of the pleadings and written stipulations of fact.

All issues raised by the pleadings, other than the taxability of the corpus of the trust of January 1, 1920, to the extent of the decedent's reversionary interest therein, were disposed of by said stipulations above-mentioned. Subsequent to the filing of the appeal, and as the result of the adjustments stipulated, the estate made a payment on account of the tax, of $6,215.92, leaving an unpaid balance on account of the deficiency of $2,072.64, the amount of the tax attributable to the inclusion in the gross estate of the reversionary interest in the corpus of the said trust of January 1, 1920, as aforesaid.

The opinion and interlocutory decision of the Board was promulgated May 16, 1933, and the final order of the Board, redetermining the deficiency, was entered December 16, 1933, in which it was ordered and decided that there is no deficiency in the estate tax. The Board of Tax Appeals, in redetermining that there is no deficiency in the estate tax, held and decided that the transfer made by the decedent, of the reversionary interest in the corpus of the trust of January 1, 1920, was not intended to take effect in possession or enjoyment at or after the decedent's death.

48 III.

The said Commissioner of Internal Revenue, being aggrieved by the conclusions of law contained in said decision, and by the said order of redetermination, desires to obtain a review thereof by the United States Circuit Court of Appeals for the Eighth Circuit.

The Commissioner's assignments of error are as follows:

1. The Board of Tax Appeals erred in holding and deciding that the Commissioner erred in including in the decedent's gross estate, for the purpose of the Federal estate tax, the value of the decedent's reversionary interest in the corpus of the trust executed by him on January 1, 1920.

2. The Board of Tax Appeals erred in failing and refusing to hold and decide that the value of the decedent's re-

versionary interest in the corpus of the trust executed by the decedent on January 1, 1920, was subject to be included in the decedent's gross estate, for the purpose of the estate tax, pursuant to the provisions of Section 302 (c) of the Revenue Act of 1924, as a transfer intended to take effect in possession or enjoyment at or after his death.

3. The Board of Tax Appeals erred in entering its final order of redetermination that there is no deficiency in the estate tax, instead of a deficiency in the tax as would
49 result from the inclusion in the decedent's gross estate of the reversionary interest of the decedent in the corpus of the trust executed by him on January 1, 1920.

4. The Board of Tax Appeals erred in failing and refusing to enter a final order of redetermination that there is a deficiency in the estate tax in the amount of the tax which would result from the inclusion in the decedent's gross estate of his reversionary interest, as of the date of his death, in the corpus of the trust executed by him on January 1, 1920, instead of entering its final order of redetermination that there is no deficiency in the estate tax.

Wherefore, the Commissioner petitions that the decision of the Board of Tax Appeals be reviewed by the United States Circuit Court of Appeals for the Eighth Circuit; that a transcript of the record be prepared in accordance with the law and with the rules of said Court and transmitted to the Clerk of said Court for filing; and that appropriate action be taken to the end that the errors complained of may be reviewed and corrected by said Court.

FRANK J. WIDEMAN,
Assistant Attorney General.

E. BARRETT PRETTYMAN,
General Counsel,
Bureau of Internal Revenue.

Of Counsel:
Frank T. Horner,
Ralph F. Staubly,
Special Attorneys,
Bureau of Internal Revenue.

50 United States of America,
District of Columbia—ss.

Ralph F. Staubly, being duly sworn, says that he is a special attorney in the Office of the General Counsel of the Bureau of Internal Revenue, and as such, is duly authorized

to verify the foregoing petition for review; that he has read said petition and is familiar with the contents thereof; that said petition is true of his own knowledge except as to the matters therein alleged on information and belief, and as to those matters he believes it to be true.

RALPH F. STAUBLY,
Special Attorney,
Bureau of Internal Revenue.

Sworn and subscribed to before me this 2nd day of March, 1934.

(Sgd.) GEORGE W. KREIS,
Notary Public.

My Commission Expires Nov. 16, 1937.

RFS/y 2/28/34

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51 (Notice of Filing of Petition for Review and Acknowledgment of Service.)

Filed March 10, 1934, United States Board of Tax Appeals.

To:

St. Louis Union Trust Company,
Mercantile Commerce Bank & Trust Company,
St. Louis, Missouri,
Respondents.

Daniel N. Kirby, Esq.,
c/o Nagel, Kirby, Orrick & Shepley,
319 North Fourth Street,
St. Louis, Missouri,
Attorney for Respondents.

You are hereby notified that the Commissioner of Internal Revenue did, on the 2nd day of March, 1934, file with the Clerk of the United States Board of Appeals, at Washington, D. C., a petition for review by the United States Circuit Court of Appeals for the Eighth Circuit, of the decision of the Board heretofore rendered in the above-entitled case. A copy of the petition for review and the assignments of error as filed is hereto attached and served upon you.

52 Dated this 2nd day of March, 1934.

E. BARRETT PRETTYMAN,
General Counsel,
Bureau of Internal Revenue.

Personal service of the above and foregoing notice, together with a copy of the petition for review and assignments of error mentioned therein, is hereby acknowledged this 5th day of March, 1934.

ST. LOUIS UNION TRUST CO.,
By O. F. Miller, Trust Officer,
Respondent on Review.

MERCANTILE-COMMERCE BANK & TRUST COMPANY, Successor Trustee to Mercantile Trust Company, of the Trust Created by Trust Indenture of William J. Orthwein, dated January 1, 1920.
By: Joseph W. White, Trust Officer,
Respondent on Review.

DANIEL N. KIRBY,
Attorney for Respondent on Review.

y/3/1/34

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53 (Stipulation of Facts.)

Filed October 19, 1932, United States Board of Tax Appeals.

United States Board of Tax Appeals.

St. Louis Union Trust Company, as Successor Trustee to Liberty Central Trust Company, as sole Residuary Legatee and Distributee of the American Estate of William J. Orthwein, deceased; joined by Mercantile Commerce Bank & Trust Company, Successor Trustee to Mercantile Trust Company, of the Trust Created by Trust Indenture of William J. Orthwein, dated January 1, 1920, Petitioners,
Docket No. 47633. vs.
Commissioner of Internal Revenue, Respondent.

It is hereby stipulated and agreed by and between the parties to the above entitled proceeding, through their respective counsel, as follows:

1. That the decedent, William J. Orthwein, a citizen of the United States of America, died in Switzerland, September 4, 1925, then a resident of, and domiciled in, Switzerland, at Territet, Switzerland.

2. That decedent left a will dated and executed at Territet, Switzerland, on November 28, 1923, by which he appointed the

Liberty Central Trust Company of St. Louis, Missouri, executor of his American estate, i. e., "All that relates to my American affairs", and "La Societe de Banque Swisse" (Swiss Bank Corporation), branch of Lausanne, executor of the rest of his estate wherever situated. A copy of said will is attached hereto and made part hereof, marked Exhibit "A".

3. That the Swiss Bank Corporation as such foreign
54 executor, took charge of and administered the estate outside of the United States. The official acts incident to this foreign administration began on September 5, 1925, immediately following the death of decedent.

4. That the American administration was conducted in the Probate Court, City of St. Louis, Missouri, where an authenticated copy of the will was filed, and said Liberty Central Trust Company was appointed executor d. b. n. on March 16, 192[illegible].

5. That decedent left a substantial estate heretofore treated and hereinafter referred to as the "American estate", consisting of:

(a) Personal property (choses in action, stocks and bonds), a substantial part of which was evidenced by: stock certificates located in the United States (chiefly in St. Louis, Missouri), evidencing shares of stock in corporations domestic to various of the United States; coupon bonds that were physically located in the United States, issued by the United States, by foreign governments, by corporations, public and private, which are domestic to various of the United States; and choses in action (like bank balances, etc.) owed by persons or corporations located in the United States.

55 As to the securities held by the Liberty Central Trust Company: When decedent, having retired from business, moved his place of residence to Switzerland, he turned over these securities to the German Savings Institution (predecessor of the Liberty Central Trust Comapny) with which he then and thereafter (until his death) conducted a deposit account. He gave no power of attorney to the bank, but told its officer with whom he made the arrangement, that he had instructed or would instruct the corporations which had issued the shares of stock thus turned over and which stood in his name, to mail to the bank the dividend checks thereon, which would be payable to him, so that the bank might deposit such checks, together with the interest coupons on the bonds that were also turned over, to the credit of decedent's deposit account with the bank. Pursuant to this arrangement, the bank received the income from these securities and credited

it, together with other deposits made by decedent, to him on his deposit account with the bank. The bank neither had nor exercised any power of control, sale or management over these securities. They were held subject to the order of decedent. The same situation or relation existed between the trust company and decedent, except that a year or so before decedent's death, he borrowed money from the Trust Company, which was credited to his deposit account, and
56 he gave the Trust Company either his collateral note or its equivalent which gave the Trust Company a lien on the securities for the payment of this debt. At decedent's death, the unpaid principal of this debt was about $16,000.00.

The personal property thus in the keeping of the Trust Company, consisted of the items of stocks and bonds described in "Schedule B" of the Federal Estate Tax Return, which is hereby referred to and made part hereof.

As to the securities that decedent had transferred in January, 1920, to the Mercantile Trust Company, of St. Louis, by his Indenture of Trust of said date: A list of the securities then transferred will be found in the copy of said Indenture of Trust hereinafter described (Exhibit "B" hereto).

A list of the securities that constituted said trust estate at the date of the decedent's death, and the remainder value of which is stated elsewhere herein, follows:

$25,000.	United Rys. Co., St. Louis, 1st Gen. Mtg. 4's
$15,000.	Ill. Cen. Ry. Co. 4% col. Gold Bonds
$10,000.	Chi. Milwaukee & St. Paul Ry. Co. 4%
$ 9,000.	Granby Mining & Smelting Co., 1st Mtg. Bonds
$10,000.	Republic of Cuba External Loan of 1909
$ 4,000.	Harrison County, Tex. Spec. Rd. 5% Bonds
$25,000.	United Kingdom of Great Britain & Ireland 5½% Bonds
$ 1,000.	Block two Eighty-one Realty Co., 6% R. E. Notes
$ 3,000.	Dominion of Canada 5% 30 yr. Gold Bonds
$ 4,000.	Argentine Nation 5 yr. 7% Gold Bonds
57 6%	First Mtg. R. E. Notes
$ 4,000.	Christiana Norway Municipal External Loan of 1920 —25 yr. 8% Sinking Fund Gold Bonds
$ 500.	Republic of Chile External Loan—25 yr. 8% Sinking Fund Gold Bonds
$ 3,000.	Queensland, Australia 6% External Gold Bonds, 25 yr. Sinking Fund
10	Shares So. Pac. Co., Common
10	Shares Pac. Oil Company
$ 900.	Missouri Theater Co., 6% First Mtg. R. E. notes
$ 2,000.	Scruggs-Vandervoort-Barney Realty Co., Denver, Colo.
$ 1,000.	Garfield Memorial Hospital, Washington, D. C. 5½% R. E. Gold Notes

As to the securities held in New York City, these stock certificates and bonds never came into the possession of the American executor although it endeavored to obtain them. They were held in New York under the control of the Swiss Bank at the date of decedent's death. Accordingly they were not included in the Trust Company's inventory or Estate Tax Return, except to the extent noted later.

They were inventoried and otherwise treated by the foreign executor as among the assets held by it and as "In New York", and they included the following items at inventoried values as shown by the Swiss inventory:

Stocks:			
300	Shares, Gillette Razor Co., valued at $90.00, or (Exch. 5.17),	139,590	Swiss francs
	(These are mentioned later herein, as having been found to belong to decedent's daughter, Alma Feraldo).		
500	Shares, Armour & Co., Ill., "A" stock, valued at $22.50, or (Exch. 5.17)	58,162.50	Swiss francs
58 500	Shares, Armour & Co., Ill. "B" stock, valued at $13.00, or (Exch. 5.17),	33,605.	Swiss francs
500	Shares, Gimbel Bros., Common, valued at $55.50, or (Exch. 5.17),	143,467.50	Swiss francs
100	Shares, U. S. Steel, Common, valued at $120.00, or (Exch. 5.17),	62,040.	Swiss francs
Bonds:			
$10,000.	6% Dutch East Indies Bonds, due 1962, with interest earned from 9/1/25; at 102½, or	52,992.50	Swiss francs
$10,000.	6% Bonds of Portland Railway Light & Power Co., First Lien & Refunding, due 1947, valued, with interest from 5/1/25,— at 98¾, or	51,053.75	Swiss francs
$30,000.	6% Bonds of Republic of Haiti, Customs and General Revenue, due 1952, valued, with interest from 4/1/25, at 97, or	150,447.	Swiss francs
$ 8,000.	6% Bonds of States of Queensland, Australia, due 1947, valued, with interest from 8/1/25, at 104½, or	43,221.20	Swiss francs
$10,000.	7% Bonds of Republic of Chile, due 1942, valued, with interest due from 5/1/25, at 101, or	52,217.	Swiss francs
$10,000.	7% Bonds of Vertientes Sugar Co., due 1942, valued with interest from June, 1925, at 89, or	46,013.	Swiss francs
$10,000.	5½% Bonds of Republic of Cuba, due 1953, valued, with interest from 7/15/25, at 100, or	51,700.	Swiss francs

$15,000. 4% Cons. Debenture stock of Canadian Pacific Ry., valued with interest from 7/1/25, at 80½, or	62,427.50	Swiss francs
$10,000. 7% Argentina Bonds, due 1927, valued, with interest from 8/1/25, at 104¼, or	52,863.25	Swiss francs
$10,000. 5% First Mortgage Bonds of Cuba Railroad Co., valued with interest from 7/1/25, at 87, or	44,979.	Swiss francs
$10,000. 6% Bonds of Oriental Development Co., due 1953, valued with interest from 3/15/25, at 85, or	43,945.	Swiss francs
59 $10,000. 6½% First Mortgage Bonds of Willis-Overland Co., due 1933; valued with interest from 9/1/25, at 101¼, or	52,604.75	Swiss francs
$15,000. 7% German 1924/49 (American branch) Bonds, valued, with interest from 4/15/25, at 98, or	75,999.	Swiss francs
$10,000. 6% Argentina 1958 B. Bonds, valued, with interest from 6/1/25, at 95½, or	49,373.50	Swiss francs
$20,000. 7% bonds of Alleg. Electricitas Gesselshaft, due 1945, valued, with interest from 7/1/25, at 93½, or	96,579.	Swiss francs
(The rate of exchange used throughout, was 5.17)		

The above securities, physically located in New York City, in the custody of a New York banking house at decedent's death, have not heretofore, for the purpose of administration, been treated as part of the American estate, except that said five items of stocks in American corporations, listed above under the heading "Stocks", were included in the Estate Tax Return as "Jointly Owned Property" and were treated in the deficiency letter attached to the Amended Petition herein, at their full (not their one-half) values.

(b) Real estate (or interests therein) located in the United States, the reasonable, fair value of which at the date of death, was $2501.00, the amount at which it was returned by the executor and determined by the Bureau.

6. That the gross foreign estate (i. e. outside of the United States) included both tangible and intangible personal property, having a total value at the date of decedent's death, of $277,635.59.

60 7. That in due course the Liberty Central Trust Company, as executor, administered the estate heretofore treated as the American estate, and made final distribution of the residue of said estate to itself as Trustee of the trust created by the will, and was discharged as executor. Thereafter, the "St. Louis Union Trust Company", a trust company

organized and doing business under the laws of Missouri, succeeded the Liberty Central Trust Company as Trustee of said trust, and took over said trust estate. By said succession the St. Louis Union Trust Company, as sole distributee of the residue of said probated estate, is the legal successor in title and liability to said Liberty Central Trust Company, executor, and said trust estate in the hands of said St. Louis Union Trust Company as Trustee, will have to pay any additional estate tax that may be assessed, and for this reason was made one of the petitioners herein.

8. That by trust indenture made by decedent, January 1, 1920, a copy of which is attached hereto, marked Exhibit "B", decedent transferred, assigned and delivered to "Mercantile Trust Company", of St. Louis, in trust, the bonds therein described, then aggregating in their principal face amount, $118,000.00, and the assets of this trust estate on hand at decedent's death, including accrued income of $989.49, then had a value of $101,421.24. This transfer was in trust, to hold, manage, and dispose of as an active trust, and to pay the net income thereof to decedent's daughter, Alma Feraldo, during her life, and thereupon for disposition as shown in the attached Exhibit "B". The "Mercantile Commerce Bank and Trust Company", of St. Louis, Missouri, is successor Trustee to said Mercantile Trust Company in said trust. Decedent's said daughter was born February 1, 1891, and survived
61 the decedent. This trust was in existence when decedent died, and is still alive.

9. That in determining the deficiency set forth in the deficiency notice, a copy of which is attached to the Amended Petition herein, the respondent included in decedent's gross estate the reversionary interest in said trust corpus subject to the life estate of said Alma Feraldo, at the value of $34,544.06. This value is agreed to have been the correct value of said remainder interest at decedent's death.

10. That the item of 300 shares of Gillette Safety Razor Company stock included in the gross estate as "Jointly Owned Property", at a value of $25,462.50, was the individual (separate) property of Mrs. Alma Feraldo, the decedent's daughter, and, therefore, is to be excluded from the value of the gross estate of decedent, heretofore treated as the American estate.

11. That by their original petition herein (Assignment of Error (2), paragraph C, pages 3 to 4), petitioners assigned error in respect of Items 1 to 5, inclusive, of "Jointly Owned Property" as included in the return. Said Item 1 related to

the 300 shares of stock in Gillette Safety Razor Company last above mentioned. The other four items consisted of: 500 shares, Armour & Co. "A" stock; 500 shares in Armour & Co. "B" stock; 500 shares in Gimbel Brothers Company; and 100 shares preferred in U. S. Steel Co. The petitioners in their Amended Petition withdrew their original Assignment of Error as to said Items 2 to 5 inclusive, but this withdrawal is necessarily subject to the question of dominion or situs.

62 12. That the gross estate heretofore considered as within the United States, had a value at decedent's death, of $612,815.29.

This does not include:

The value of said 300 shares of stock in Gillette Razor Co., found to be the property of decedent's daughter,	$ 25,462.50
The remainder value of said assets transferred in trust, the propriety of including which is herein disputed by petitioners,	34,544.06
Total of said two excluded items,	$ 60,006.56

13. That the estate has expended the following amounts on account of administration expenses and claims against the estate:

Funeral expenses	$ 11,375.22
Executors' commissions	23,308.66
Attorneys' fees	7,500.00
Miscellaneous administration expenses	1,007.40
Debts	76,637.98
Taxes	21,531.84
Total	$141,361.10

In determining the value of the net estate, the estate is entitled to a deduction on account of the expenditures set forth in paragraph 13 above, not to exceed 10% of the value of the gross estate situated in the United States.

14. That the estate has paid State inheritance taxes amounting to $6,793.03, and is entitled to a credit against the Federal estate tax on account thereof, not to exceed 25% of the estate tax.

63 15. That this case is submitted to the Board for decision upon the basis of the pleadings and this stipulation, and both parties request that the Board allow sixty days from the filing hereof, in which to file briefs, provided, however, that both parties reserve all rights to contest, by appropriate proceedings, any decision the Board may render in this case.

DANIEL N. KIRBY,
Counsel for Petitioners.

C. M. CHAREST,
General Counsel,
Bureau of Internal Revenue,
Counsel for Respondent.

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64 Exhibit "A".

Copy

of the authentic dispositions of the last Will and Testament of William-Julius, son of Charles-Frederic Orthwein deceased and of Carolina Nulsen, husband of Alma Espenhaim, without profession, native of the United States of America, residing at Territet, born in St. Louis on the 21st of August, 1867, deceased at his domicile, Villa du Midi, Territet, on the 4th day of September 1925.

Testament

Before me Henri-Samuel Bergier, a Notary at Lausanne (Canton of Vaud, Switzerland), for the District of Lausanne

appears:

Mr. William-Julius, son of Charles-Frederic Orthwein deceased, a citizen of the United States of North America, residing at Territet, parish of Planches-Montreux, (Canton of Vaud, Switzerland) without profession, who personally known by me Notary, appearing to me as being of sound mind and acting under the control of his will alone, has required my ministry for taking down his testament which he expressed in the following terms:

Article First.

I annul all the wills that I have made anteriorly to this day, the last one having been signed on the eighteen of January nineteen hundred and twenty three at Me. Bergier's, Notary at Lausanne.

Article Second.

For all that concerns the securities which I have disposed of by the pact of succession I signed before the Notary Bergier on the twelfth of December nineteen hundred and
65 twenty one, I declare that I refer to said pact which retains all its value, undergoes no modifications and it confirmed by me in its whole. I therefore confirm expressly my will to the effect that these securities be attributed conformably to what is said in the pact of succession of the twelfth of december nineteen hundred and twenty one.

Article Third.

I appoint my Executors the Liberty Central Trust Company, at Saint Louis (State of Missouri, United States of North America) for all that relates to my American affairs, and "la Societe de Banque Suisse" (Swiss Bank Corporation) branch of Lausanne, for all that relates to my affairs of Europe as well as to my "outside of Europe" affairs that I will have instrusted it with during my life-time.

Article Fourth.

I institute my only daughter, Mme. Alma Feraldo nee Orthwein the sole heir to all the property I have not disposed of specially, my will being she have the whole of said property, with the reservation of the rights that the Swiss law grant to the widow and with the reservation also of the restrictive clauses mentioned in the pact of succession of the twelfth of December nineteen hundred and twenty one.

On account of the sickness my wife is afflicted with, I desire that her legal representative, after my death, choose the usufruct of half the property my daughter will inherit of me, in place and stead of the fourth in property.

The Testator reads the above testament and the Notary calls as witnesses the citizens Auguste Mounoud of
66 Thioleyres, coffee house keeper, and Frederic Eternod, of Baulmes, merchant, both residing at Planches-Montreux, Swiss citizens, of age and in possession of their civic rights.

In their presence, the two witnesses in the presence of each other, the testator, William-Julius Orthwein, declares that he has read the hereinabove testament and that it is the expression of his last will, and he signs it affixing his name thereto in the presence of the Notary and of the witnesses, the whole done at Territet (Canton of Vaud, Switzerland) Villa du

midi, on the twenty eight of November nineteen hundred and twenty three at sixteen o'clock.

Signed: "WILLIAM J. ORTHWEIN;
H. S. BERGIER, Not.

The hereinabove named witnesses declare that the testator made to them the hereinabove declaration, that he signed the deed in their presence and that he appeared to them as being able to dispose and act freely, then they sign with the Notary, at Territet, the twenty eight of November nineteen hundred and twenty three at sixteen o'clock and five minutes.

Signed: A. MOUNOUD;
FRED ETERNOD;
H. S. BERGIER, Not.

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67 Exhibit "B".

This Indenture made this 1st day of January, 1920, by and between William J. Orthwein, of the City of St. Louis, State of Missouri, (temporarily sojourning in Switzerland), party of the first part, hereinafter called "Grantor", and Mercantile Trust Company, of the same City and State, as Trustee, party of the second part, hereinafter called "Trustee", Witnesseth; That,

Whereas, the Grantor owns the personal property hereinafter described, and having other property with which to meet his personal needs, desires by this Indenture to make for the benefit of his daughter, Mrs. Alma Feraldo, a citizen of Peru, and the wife of Pablo Feraldo, of Lima, Peru, as the life beneficiary of the trust hereby created, an absolute and irrevocable gift and settlement of the property hereinafter described, so that the Grantor shall during the life of his said daughter have no further individual or beneficial interest therein, but the same and the net income thereof shall be held managed and disposed of, by the Trustee of the trust hereby created, for the benefit during her life of the grantor's said daughter, and in trust for her support, maintenance and other benefit, all upon the conditions and trusts, subject to the limitations, and for further and final disposition to the persons, upon the conditions and limitations, and in the manner, hereinafter set out;

Now, Therefore, in consideration of the premises and of the love and affection which the Grantor bears to his said daughter, and of the sum of One Dollar ($1.00) to him in hand paid

by the party of the second part, the receipt of which is hereby acknowledged, the Grantor does hereby convey, assign,
68 transfer and deliver to the party of the second part as Trustee, and to its successor or successors in trust, each and all of the following described items of personal property, together with the choses in action evidenced thereby, and all rights of security and of action afforded to each of said items by the various forms of security now existing or which may hereafter exist in respect thereto, viz.:

$ 25,000 United Railways of St. Louis 1st General Mortgage 4% bonds dated Sept. 20th, 1899, due July 1, 1934, coupons Jan. 1st, July 1st. Nos. 16542 to 16549, inc. of both, 16591 to 16593, inc. of both, 16600, 18670 to 18679, inc. of both, 18683, and 16598 and 16599.

13,000 New Long Distance Telephone Co. of Indiana 1st Mortgage 5% Bonds dated Jan. 1, 1903, due Jan. 1, 1923, coupons Jan. 1st and July 1st. Nos. 117, 218, 220, 226, 518, 645 to 649, inc. of both, 695, 696 and 697.

1,000 Southern Pacific Railway Co. 20-yr. Convertible 5% Gold bond dated June 1, 1914, due June 1, 1934, coupons June 1st and Dec. 1st No. M 1877.

15,000 Illinois Central Railway 4% Collateral Gold Bonds dated March 31, 1888, due April 1, 1952, coupons April 1st and Oct. 1st. No. 1349 for $1,000. Nos. 14066, 14099, 14381, 14411 to 14413, inc. of both, 16533, 16638, 14476 to 14482, inc. of both, 14496, 14543, 14623, 14655, 14813, 14857, 15422, 15424, 15431, 15468, 15473, 15523, 15524 for $500 each.

10,000 Chicago, Milwaukee & St. Paul Railway Co. temporary 4% bonds dated Dec. 1, 1915, due June 1, 1925. Coupons due June 1st and Dec. 1st. Nos. 31481 to 31490, inc. of both.

19,000 Granby Mining Company 1st Mortgage 5% bonds dated June 1, 1916, due June 1, 1926, coupons June 1st and Dec. 1st. Nos. 1289 to 1293, inc. of both, 1295, 1298, 1299, 1300 to 1303 inc. of both, 1305 to 1308, inc. of both, 1461, 1468 & 1469.

10,000 Republic of Cuba External Loan of 1909 4-1/2% bonds dated Aug. 2, 1909, due Aug. 1, 1949, coupons due Feb. 1st and Aug. 1st. Nos. 13721, 13722,

13881, 14152, 14153, 14176, 14177, 14864, 14865 and 14890.

25,000 United Kingdom of Great Britain & Ireland 5-1/2% bonds dated Feb. 1, 1917, due Feb. 1, 1937, coupons due Feb. 1st and August 1st. Nos. M126902 to M126921, inc. of both, M80971 and M140136 to M140139, inc. of both.

$118,000

69 Said securities and rights are hereby conveyed, assigned, transferred and delivered to the Trustee, in trust to hold, manage and dispose of the same as an active trust estate, subject to the following trusts, duties, powers, conditions, and limitations:

1. It shall be the duty of the Trustee, and in the performance thereof the Trustee shall have power in its absolute discretion except as herein otherwise provided:

(a) To collect the income from the trust estate as the same accrues, and during the life of the Grantor's said daughter (unless the trust shall be sooner terminated pursuant hereto), to pay the net income thereof to said daughter, or to expend the same for her support, maintenance or such other benefit as the Trustee in its discretion deems wise on her behalf; it being intended that the net income shall be paid direct to her rather than expended by the Trustee for her benefit, during such periods as the Trustee in its discretion thinks that conditions surrounding her and influencing her use of said net income are such that she herself will receive and use the same for her own benefit and that of her children (if any), and that whenever and as often as the Trustee shall, in the exercise of its discretion, conclude that the conditions or surroundings affecting my daughter are such that it would be better for her if the Trustee should itself make a part or all of the expenditures of income, or that she should require the prior approval of the Trustee to the making of such expenditures, then the Trustee may either make such expenditures itself or require its prior consent to the making of such expenditures requested by my daughter. In any event it is intended that the entire net income shall be either paid to her or expended for her benefit. Such payments of net income to my said
70 daughter shall be made monthly by the Trustee crediting the amounts to her in her name upon open deposit account subject to draft or check by her, or at her election by

depositing the same in some bank to be designated by her, to the credit of her individual account subject to draft or check by her.

(b) To make such investments and reinvestments of the trust estate as to the Trustee shall seem wise, without any limitation whatever in respect of the character of property or securities in which such investments may be made, except that while the trust exists the Trustee shall consult and be guided by the advice and wishes of the Grantor's daughter during her life and so long as she is competent and willing to advise, in relation to the purchase, sale, or exchange of assets belonging to the trust estate. The competency and willingness of said daughter to advise concerning the investments, shall be determined by the Trustee mailing a registered letter, addressed to her at the last residence given by said daughter to said Trustee, advising her of the proposed purchase, sale or exchange of the investments. Upon the failure of said daughter for any reason to address a letter to the Trustee, said letter to be mailed so that it will be delivered to the Trustee within sixty (60) days after the mailing of the registered letter by my said Trustee, indicating her wishes in the matter, then the Trustee shall be empowered to act according to its judgment and discretion provided however, that in case the Trustee, within thirty days after having mailed its said letter to said daughter, shall receive advice by cable that she has mailed a letter to the Trustee, then the Trustee shall await the receipt of her said letter before acting. To make separate investments for the trust estate hereby created, or to make joint investments with other persons or trusts. Also, to exercise for the benefit of the
71 trust estate as complete powers of control, protection, management, conversion, investment and reinvestment of the trust assets and every part thereof, as the Trustee could have exercised had it been the absolute owner thereof in its own right; and the foregoing broad grant of general powers is not intended to be cut down or limited in effect by the enumeration and grant in this Indenture of certain specific powers.

(c) Upon the distribution, to make division in kind or otherwise of the trust property, and to convert part or all into cash for the purpose of division; and the Trustee's valuation of any trust property for the purpose of any division or distribution hereunder shall be conclusive on all persons claiming hereunder.

(d) To terminate the trust hereby created, prior to either of the times herein elsewhere limited, and at such time as the Trustee may deem it wise that the trust be terminated.

In case of and upon such earlier termination, the Trustee shall pay, convey and deliver the trust estate then on hand, to the Grantor if then living; and if he be not alive, then to his said daughter if then living; and if she be not alive, then to her children (if any) then living, in equal shares, and in case there be no such children, then to the then living "next of kin" of the Grantor, that is to say, to those persons living at the time of the said earlier termination of the trust, who would have been the next of kin of the Grantor, and in the same proportions, as defined by the statutes of the State of Missouri, U. S. A. now in force, governing the distribution of the personal estate of an intestate decedent resident in Missouri, had the Grantor died (at the time of such earlier termination of the trust) intestate, a resident of Missouri, and owning said trust estate absolutely, and had said stat-
72 utes been in force at said time.

(e) To determine whether receipts constitute principal or income of the trust estate, and whether disbursements should be charged to principal or income; and the conclusion of the Trustee upon each such matter shall be binding on all persons claiming or to claim hereunder.

II. Upon the death of the Grantor's said daughter:

(a) If the Grantor be still living, the Trustee shall forthwith (unless the trust shall have been terminated earlier, pursuant to other provisions herein), transfer, pay, and deliver the entire trust estate to the Grantor, to be his absolutely.

(b) If the Grantor be not then living, but the wife of the Grantor, Alma Orthwein, who is now an invalid, be then living, then the Trustee shall continue to hold the trust estate hereunder, and shall not make any payments of net income direct to or upon the order of said Alma Orthwein, but shall expend said net income or so much thereof as the Trustee deems wise, for the maintenance, support, care of, and such other benefit to, said Alma Orthwein, as the Trustee, in its sole discretion, deems wise and expedient in her behalf.

(c) Upon the death of said Alma Orthwein, if and after she shall, pursuant to the above provisions, have received the benefit of the income of the trust estate, or upon the death of the Grantor's said daughter, in case said daughter be survived by a child or children but not by the Grantor or the said wife of Grantor, then the Trustee shall continue to hold the

trust estate for the equal benefit of the children of said daughter, using the net income for their support, maintenance or other benefit or paying the same direct to them as the Trustee deems wise, during their respective minorities as defined by the present laws of Missouri, and distrib-
73 uting and paying to each of them upon his or her attaining such majority, and to the survivors of them, the share of such child in the trust estate; provided however, that in no case shall such final distribution be postponed longer than twenty-one years after the death of the longest to survive of the Grantor, his said wife and his said daughter, and that in case of such termination of the trust estate by lapse of time pursuant to the said limitation contained in this proviso, the Trustee shall divide, distribute, pay, convey and deliver the trust estate then on hand, among and to those persons who are the beneficiaries hereunder of the net income thereof at the time of such termination, and in the same proportions in which they are then entitled hereunder to the benefit of said net income.

(d) If upon the death of the Grantor's said daughter, neither the Grantor, nor his said wife, nor a child or children of his said daughter, then survive, or, if after the death of said daughter and pursuant to the provisions of subdivision "(c)" last above, the trust estate is being held for the benefit of a child or children of said daughter of the Grantor and said child (if there be only one), or all of said children, shall die before having received distribution of the principal, then the Trustee shall forthwith make final distribution of the trust estate (with the undistributed income, if any then on hand), to such persons, in such proportions, and upon such conditions, limitations, uses or trusts, as the said daughter of the Grantor may by her last will have appointed or provided,—and in default of such appointment or provision, then among and to the "next of kin" of the Grantor, i. e., to those persons living at the time of the said termination of the trust, who would have been the next of kin of the Grantor and in the same proportions, as defined by the statutes of the
74 State of Missouri, U. S. A., now in force, governing the distribution of the personal estate of an intestate decedent resident in Missouri, had the Grantor died (at the time of such termination of the trust) intestate, a resident of Missouri, and owning said trust estate absolutely, and had said statutes been in force at said time. All distributions or payments of net income pursuant to this Indenture shall be made in convenient installments, not less often than semi-annually; provided however, such payments of net income to my said

daughter shall be made monthly by the Trustee crediting the amounts to her in her name upon open deposit account subject to draft or check by her, or at her election by depositing the same in some bank to be designated by her, to the credit of her individual account subject to draft or check by her.

III. The trust estate created hereby, is intended to provide for and secure to the beneficiary or beneficiaries of the net income thereof, during the life of the trust, a sure income from the trust estate, therefore: (a) all benefits given hereby to the said daughter of the Grantor or passing to her daughters (if any), shall pass as her (or their) sole and separate equitable estate free from all right, title, interest, courtesy, control, community rights, and every other marital or statutory interest or right of any husbands said daughter (or her daughters) may at any time have; and (b) neither the assets constituting the principal of the trust estate, nor any right hereby given to any beneficiary or beneficiaries to receive the income or principal thereof, shall (until such beneficiary or beneficiaries shall have actually received distribution thereof), be subject to or capable of sale, voluntary or involuntary transfer, assignment, mortgage or anticipation in said or any other method, and all such attempted sales, transfers, assignments, mortgages or anticipations shall be void; and no title or right of possession capable of voluntary or involuntary disposal by any beneficiary shall pass hereunder in respect of such trust estate or the income thereof, until and to the extent that the Trustees shall pursuant hereto have actually made distributions or payments to such beneficiary.

IV. The trust estate hereunder shall include, and all the provisions hereof shall apply to, not only the assets hereinabove specifically described, but also such additional property as the Grantor may hereafter from time to time add thereto by transferring or delivering the same to the Trustee hereunder as additions to the trust estate hereby created.

V. In case of the resignation or refusal, failure or inability to act, or of the retirement from active business, of the Trustee hereby appointed or of any successor trustee, or in case the said daughter of the Grantor, shall at any time deem it expedient in the interest of the beneficiary or beneficiaries, to appoint a new trustee hereunder, then the said daughter of the Grantor, may appoint a successor in trust, by written instrument signed by said daughter and delivered to the new trustee thus appointed; and any new trustee thus appointed shall thereby and thereupon have all the title powers and du-

ties of the Trustee herein named, and the retiring trustee shall pay over, transfer and account to the new trustee for all the trust estate then on hand.

All provisions herein made in respect of the Trustee herein named, are intended to apply with like effect to each and every successor trustee. Each and every reference herein to the Trustee shall, unless otherwise expressly indicated, refer to and include the trustee at the time in such instance referred to.

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VI. Said Mercantile Trust Company hereby accepts the trust created by this Indenture, and agrees to hold said property upon and subject to the trusts herein expressed; and the Trustee agrees to perform the duties herein imposed upon the Trustee, being personally liable only for its own wilful neglect or default. The compensation of the Mercantile Trust Company for its services hereunder, shall be five per centum of the income received and disbursed by it, and on final distribution of the corpus of the trust estate, five per centum of the then fair value of the corpus.

In Witness Whereof, the Grantor has hereunto set his hand and seal, and the Trustee has duly executed this instrument (in two counterpart copies) on the day and year first above written.

WILLIAM J. ORTHWEIN (Seal)

MERCANTILE TRUST COMPANY,
Trustee,
By William Maffitt,
Vice and Acting President.

Attest:
J. J. Farell,
Assistant Secretary.

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Praecipe for Transcript.

Filed April 28, 1934, United States Board of Tax Appeals.

To the Clerk of the United States Board of Tax Appeals:

You will please prepare, transmit and deliver to the Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, copies duly certified as correct of the following documents and records in the above-entitled cause in connection with the petition for review by the said Circuit Court of Ap-

peals for the Eighth Circuit, heretofore filed by the Commissioner of Internal Revenue:

1. Docket entries of the proceedings before the Board.
2. Pleadings before the Board:—
   (a) Petition, excluding annexed copy of deficiency notice.
   (b) Answer.
   (c) Amended petition, including annexed copy of deficiency notice.

78 (d) Answer to amended petition.

3. Findings of fact, opinion and decision of the Board.
4. Petition for review, together with proof of service of notice of filing petition for review and of service of a copy of petition for review.
5. Stipulation of facts.
6. This praecipe.

ROBERT H. JACKSON,
General Counsel,
Bureau of Internal Revenue.

Service of a copy of the within praecipe is hereby admitted this 26 day of April, 1934.

DANIEL N. KIRBY,
Attorney for Respondents on Review.

RFS/y 3/19/34.

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79 (Clerk's Certificate to Transcript.)

United States Board of Tax Appeals.

Washington.

Commissioner of Internal Revenue, Petitioner
Docket No. 47633. vs.
St. Louis Union Trust Company, as Successor Trustee to Liberty Central Trust Company, as sole Residuary Legatee and Distributee of the American Estate of William J. Orthwein, Deceased; joined by Mercantile Commerce Bank & Trust Company, Successor Trustee to Mercantile Trust Company, of the Trust created by Trust Indenture of William J. Orthwein, Dated January 1, 1920, Respondents.

I, B. D. Gamble, Clerk of the U. S. Board of Tax Appeals, do hereby certify that the foregoing pages, 1 to 78, inclusive, contain and are a true copy of the transcript of record, papers, and proceedings on file and of record in my office as called for by the Praecipe in the appeal as above numbered and entitled.

In testimony whereof, I hereunto set my hand and affix the seal of the United States Board of Tax Appeals, at Washington, in the District of Columbia, this 21st day of May, 1934.

Seal
U. S. Board
of Tax Appeals
1924.

B. D. GAMBLE,
Clerk,
United States Board of Tax Appeals.

Filed May 26, 1934. E. E. Koch, Clerk.

And thereafter the following proceedings were had in said cause in the Circuit Court of Appeals, viz:

(Appearance of Mr. Frank J. Wideman and Mr. Sewall Key as counsel for petitioner)

United States Circuit Court of Appeals, Eighth Circuit

No. 10016

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

vs.

ST. LOUIS UNION TRUST COMPANY, AS SUCCESSOR TRUSTEE, ETC., ET AL.

The clerk will enter my appearance as counsel for the petitioner.

FRANK J. WIDEMAN,
Assistant Attorney General.

SEWALL KEY,
Special Assistant to the Attorney General.

(Endorsed:) Filed in U. S. Circuit Court of Appeals, June 4, 1934.

(Appearance of Mr. Robert H. Jackson and Mr. Frank T. Horner as counsel for petitioner)

The clerk will enter our appearances as counsel for the petitioner.

ROBERT H. JACKSON,
General Counsel, Bureau of Internal Revenue.

NK T. HORNER,
Special Attorney, Bureau of Internal Revenue.

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Jun. 4, 1934.

(Appearance of Mr. L. W. Post as counsel for petitioner)

The clerk will enter our appearances as counsel for the petitioner.

FRANK J. WIDEMAN,
Assistant Attorney General.

SEWALL KEY,
L. W. POST,
Special Assistants to the Attorney General.

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Aug. 30, 1934.

(Appearance of Mr. Maurice J. Mahoney as counsel for petitioner)

The clerk will enter my appearance as counsel for the petitioner.
MAURICE J. MAHONEY.

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Nov. 26, 1934.

(Appearance of Mr. Daniel N. Kirby as counsel for respondents)

The clerk will enter my appearance as counsel for the respondents.
DANIEL N. KIRBY.

(Endorsed:) Filed in U. S. Circuit Court of Appeals, June 5, 1934.

Order of submission

November term, 1934

TUESDAY, NOVEMBER 27, 1934.

This cause having been called for hearing in its regular order, argument was commenced by Mr. Maurice J. Mahoney, Special Assistant to the Attorney General, for petitioner, continued by Mr. Daniel N. Kirby for respondent, and concluded by Mr. Maurice J. Mahoney, Special Assistant to the Attorney General, for petitioner.

Thereupon, this cause was submitted to the court on the transcript of the record from said Board of Tax Appeals and the briefs of counsel filed herein.

Opinion

United States Circuit Court of Appeals, Eighth Circuit

No. 10016. November term, A. D. 1934

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

vs.

ST. LOUIS UNION TRUST COMPANY, AS SUCCESSOR TRUSTEE TO LIBERTY Central Trust Company, as Sole Residuary Legatee and Distributee of the American Estate of William J. Orthwein, Deceased, et al., respondents

On petition to review decision of United States Board of Tax Appeals

January 17, 1935

Mr. Maurice J. Mahoney, Special Assistant to the Attorney General (Mr. Frank J. Wideman, Assistant Attorney General, and Mr. Sewall Key and Mr. L. W. Post, Special Assistants to the Attorney General, were on the brief), for the petitioner.

Mr. Daniel N. Kirby (Mr. Arthur B. Shepley, Jr., and Messrs. Nagel, Kirby, Orrick & Shepley were with him on the brief), for the respondents.

Before SANBORN, WOODBROUGH, and BOOTH, Circuit Judges

SANBORN, Circuit Judge, delivered the opinion of the court.

This is a petition to review an order of redetermination of estate taxes made by the Board of Tax Appeals (28 B. T. A. 107).

The question presented is whether the interest of a decedent in the corpus of a trust created by him should be included in his gross estate as a transfer "intended to take effect in possession or enjoyment at or after his death", under section 302 of the Revenue Act of 1924, c. 234, 43 Stat. 253, 304.

The essential facts are these: William J. Orthwein, a citizen of the United States residing in Switzerland, died testate September 4, 1925. The respondent St. Louis Union Trust Company, as successor trustee to Liberty Central Trust Company, is the sole residuary legatee under his will. On January 1, 1920, the decedent had created a trust primarily for the benefit of his daughter, who was then 29 years of age, married, and living in Peru. He transferred various of his securities to the Mercantile Trust Company, of St. Louis, Missouri, as trustee, to manage, invest, and reinvest the principal thereof, and to pay the income therefrom to his daughter during her lifetime. Upon the death of the daughter, if the grantor was then living, the trust property was to revert to him. If he was not then living, the trust was to continue for the benefit of his wife if she were living. In case neither the grantor nor his wife was living at the time of the daughter's death, the trust was to continue for the benefit of the daughter's children, if any, during their minority, and the trust property was to be divided between them as they became of age. In case of the death of all of the designated beneficiaries prior to the termination of the trust, the trust property was to go to those who were appointed to receive it by the daughter's will, or, if she left no will, to the next of kin of the grantor.

The trustee was given power to terminate the trust "at such time as the trustee may deem it wise that the trust be terminated." If the trustee should terminate the trust during the lifetime of the grantor, the trust property was to revert to him. If the trust was terminated after his death, the property was to go to the daughter if living; if not living, to her children; and, if there were no living children, then to the grantor's next of kin. The trust instrument recited that it was the desire of the grantor to make for his daughter, as the life beneficiary of the trust, "an absolute and irrevocable gift and settlement" of the trust property, "so that the grantor shall during the life of his said daughter have no further individual or beneficial interest therein."

The trust was not made in contemplation of death. It was not terminated by the trustee during the lifetime of the decedent. The daughter survived the decedent, the trust still continues for her benefit, and the respondent Mercantile-Commerce Bank & Trust Company has succeeded the Mercantile Trust Company as trustee.

At the date of the decedent's death, the trust estate was of the value of $101,421.24, and the value of the reversionary interest therein, subject to the life estate of the daughter, was agreed to be $34,544.06. The Commissioner of Internal Revenue added to the gross estate of the decedent the value of the reversionary interest in the trust, which resulted in a deficiency in estate taxes. On appeal the Board held that such interest was no part of the estate. Hence this petition to review.

The theory of the petitioner is that the decedent, in creating the trust, had reserved to himself a substantial interest in the trust property in the nature of a vested remainder, and that, since his death had the effect of making available to others this interest which might have reverted to him during his lifetime, the value thereof was properly taxable as a part of his estate, in view of *Klein* v. *United States*, 283 U. S. 231.

The *Klein case* dealt with a deed wherein the grantor had conveyed a life estate in real property to his wife, expressly reserving to himself the fee, which was to "remain vested in said grantor" in the event that the grantee "shall die prior to the decease of said grantor", but was to pass to the grantee if she survived the grantor. The court said (page 234 of 283 U. S.):

"It is perfectly plain that the death of the grantor was the indispensable and intended event which brought the larger estate into being for the grantee and effected its transmission from the dead to the living, thus satisfying the terms of the taxing act and justifying the tax imposed."

Had the decedent in the case at bar retained the legal title to all of the trust property, and had he provided that, upon his death, and not before, such title should pass to his daughter or to others or to a trustee for her or their benefit, the situation would be comparable to that in the *Klein case;* but here the decedent parted with the legal title to the trust property and to all beneficial interest therein during the life of the trust, and did so irrevocably. It was only in the case of the happening of certain contingencies over which he had no control, that the property would revert to him. One of these contingencies was the death of his daughter prior to his death, while the trust still continued; and the second was a termination by the trustee of the trust during the lifetime of the grantor. Neither of these contingencies occurred, and there was, during the decedent's lifetime, nothing more than a possibility that either would occur. In no proper sense was there an enlargement of the interests of the beneficiaries of the trust resulting from the death of the decedent. That event merely changed the possi-

bility that the property would revert to him into an impossibility. The distinction between the *Klein case* and this case, as we see it, is that in the former the legal title was retained by the grantor and passed to the grantee with the grantor's death, while here the grantor parted with the title and all beneficial interest in the property, and retained no right with respect thereto that would pass to anyone as the result of his death. In the *Klein case*, death was the generating source of title, while in this case the trust instrument was the source of title, and death merely destroyed a possibility that the trust property might revert to the grantor.

The conclusion which the Board reached appears to be fully sustained by the following cases: *Reinecke* v. *Northern Trust Co.*, 278 U. S. 339; *May* v. *Heiner*, 281 U. S. 238; *McCormick, et al.*, v. *Commissioner*, 13 B. T. A. 423, reversed in *Commissioner* v. *McCormick, et al.*, (C. C. A. 7), 43 F. (2d) 277, but affirmed per curiam in *McCormick, et al.*, v. *Burnett*, 283 U. S. 784; *Duke* v. *Commissioner*, 23 B. T. A. 1104, affirmed in *Commissioner* v. *Duke* (C. C. A. 3), 62 F. (2d) 1057, and in *Helvering* v. *Duke*, 290 U. S. 591, by an equally divided court; *Wallace* v. *Commissioner*, 27 B. T. A. 902, affirmed in *Commissioner* v. *Wallace* (C. C. A. 2), 71 F. (2d) 1002.

The decision of the Board is affirmed.

United States Circuit Court of Appeals, Eighth Circuit

November term, 1934

THURSDAY, JANUARY 17, 1935.

No. 10016

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

vs.

ST. LOUIS UNION TRUST COMPANY, AS SUCCESSOR TRUSTEE TO LIBERTY CENTRAL TRUST COMPANY, as sole Residuary Legatee and Distributee of the American Estate of William J. Orthwein, Deceased; Joined by Mercantile-Commerce Bank and Trust Company, Successor Trustee to Mercantile Trust Company, of the Trust Created by Trust Indenture of William J. Orthwein, Dated January 1, 1920

On petition to review decision of United States Board of Tax Appeals.

This cause came on to be heard on the petition to review an order of redetermination of estate taxes made by the United States Board of Tax Appeals, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged, and decreed, by this Court, that the decision of the said Board of Tax Appeals in this cause, be, and the same is hereby, affirmed.

It is further ordered that the petition to review in this cause, be, and the same is hereby, dismissed, without costs to either party in this Court.

January 17, 1935.

United States Circuit Court of Appeals, Eighth Circuit

I, E. E. Koch, clerk of the United States Circuit Court of Appeals for the Eighth Circuit, do hereby certify that the foregoing contains the record on petition to review the decision of the United States Board of Tax Appeals as prepared and printed under the rules of the United States Circuit Court of Appeals for the Eighth Circuit, under the supervision of its clerk, and full, true, and complete copies of all the pleadings, record entries, and proceedings, including the opinion, had and filed in the United States Circuit Court of Appeals, except the full captions, titles, and endorsements omitted in pursuance of the rules of the Supreme Court of the United States, in a certain cause in said Circuit Court of Appeals wherein Guy T. Helvering, Commissioner of Internal Revenue, was petitioner, and the St. Louis Union Trust Company, as Successor Trustee to Liberty Central Trust Company, as Sole Residuary Legatee and Distributee of the American Estate of William J. Orthwein, Deceased, et al., were respondents, No. 10016, as full, true, and complete as the originals of the same remain on file and of record in my office.

I do further certify that on the eighteenth day of February, A. D. 1935, a mandate was issued out of said Circuit Court of Appeals directed to the United States Board of Tax Appeals.

In testimony whereof I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Eighth Circuit, at office in the city of St. Louis, Missouri, this eighth day of April, A. D. 1935.

[SEAL] E. E. KOCH,

Clerk Circuit Court of Appeals, Eighth Circuit.

U. S. GOVERNMENT PRINTING OFFICE: 1935

Supreme Court of the United States

Order allowing certiorari

Filed May 20, 1935

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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In the Supreme Court of the United States

OCTOBER TERM, 1934

No. —

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

ST. LOUIS UNION TRUST COMPANY, AS SUCCESSOR TRUSTEE TO LIBERTY CENTRAL TRUST COMPANY, AS SOLE RESIDUARY LEGATEE AND DISTRIBUTEE OF THE AMERICAN ESTATE OF WILLIAM J. ORTHWEIN, DECEASED, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR EIGHTH CIRCUIT

The Solicitor General, on behalf of Guy T. Helvering, Commissioner of Internal Revenue, prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Eighth Circuit, entered in the above-entitled cause January 17, 1935 (R. 62), affirming a decision of the United States Board of Tax Appeals (R. 26).

OPINIONS BELOW

The findings of fact and opinion of the Board of Tax Appeals (R. 26) are reported in 28 B. T. A.

107. The opinion of the Circuit Court of Appeals (R. 59) is reported in 75 F. (2d) 416.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered January 17, 1935 (R. 62). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED

The decedent created an *inter-vivos* trust with directions (1) to pay the income therefrom for life to a daughter, upon whose death prior to that of the creator the trust should terminate and the corpus be delivered to the grantor; or (2) if the grantor predecease the daughter, for continuance of the trust with disposition of the income and corpus according to future contingencies.

The question is whether the interest of the decedent therein should be included in his gross estate as a transfer "intended to take effect in possession or enjoyment at or after his death", under Section 302 (c), Revenue Act of 1924.

STATUTE AND REGULATIONS INVOLVED

The statute and regulations involved will be found in the Appendix, *infra*, pp. 12–13.

STATEMENT

The facts as found by the Board of Tax Appeals (R. 28–31) are substantially as follows:

The decedent, William J. Orthwein, a citizen of the United States, died on September 4, 1925, then a resident of Switzerland.

The decedent, by indenture dated January 1, 1920 (R. 48), created an *inter vivos* trust, with which we are herein concerned, naming as trustee the Mercantile Trust Co., which was succeeded by the Mercantile Commerce Bank & Trust Co., one of the respondents herein. The Commissioner included in the decedent's taxable estate the then value of decedent's interest in the assets which constituted the corpus of this *inter vivos* trust.

Under the will of the decedent, executed November 28, 1923, he created another trust, of the American estate of the decedent, the provisions of this trust not being involved in this proceeding. He named as trustee of the trust under the will the Liberty Central Trust Co., who was also named as executor of the American estate. The Liberty Central Trust Co., as executor, made final distribution to itself as trustee of the trust created by the will, and was discharged as executor. Thereafter the St. Louis Union Trust Co. succeeded the Liberty Central Trust Co. as trustee under the will. The St. Louis Union Trust Co., as sole distributee in its trust capacity of the residue of the estate, would be liable to pay any additional estate tax on the *inter vivos* trust, and is therefore named as a respondent herein.

By the indenture creating the *inter-vivos* trust the decedent transferred various securities to the

trustee to hold, manage, and dispose of as an active trust and to pay the net income thereof to the decedent's daughter, Alma Feraldo, during her life and upon her death to make disposition of as provided in the indenture.

The indenture provided that if the daughter predeceased the grantor the trust should terminate and the trust estate should be paid over to the grantor, if living. The trustee was given discretionary power to terminate the trust when the trustee might deem it wise.

The trust indenture further provided that upon the death of the grantor's daughter, if the grantor were not then living the income should be used for the benefit of the grantor's wife if living, and after her death and the death of the daughter, if the daughter were survived by a child or children, then for their equal benefit during their minority, and upon their majority the corpus of the trust estate was to be distributed to them or the survivors of them. It contained a further provision for disposal of the trust estate to the next of kin of grantor in the event of the daughter leaving neither the grantor, his wife, nor any children of her own surviving her (R. 52–53).

The daughter did not predecease the decedent but survived him. The value of the trust securities at the date of decedent's death was $101,421.24 and the then value of the decedent's reversionary interest subject to the daughter's life estate was $34,544.06 (R. 30–31).

The Commissioner, in determining the deficiency claimed herein, included the reversionary interest at that value. Upon review, the Board of Tax Appeals decided against the Commissioner. The Circuit Court of Appeals affirmed the decision of the Board.

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

1. In holding that the value of the decedent's interest in the trust property should not be included in the gross estate of the decedent under Section 302 (c), Revenue Act of 1924, as a transfer intended to take effect in possession or enjoyment at or after death.

2. In affirming the Board of Tax Appeals on the authority of *Reinecke* v. *Northern Trust Co.*, 278 U. S. 339; *May* v. *Heiner*, 281 U. S. 238; and *McCormick* v. *Burnet*, 283 U. S. 784.

3. In affirming the Board of Tax Appeals.

REASONS FOR GRANTING THE WRIT

1. The decision of the Circuit Court of Appeals in this case is in conflict with the decision of the Circuit Court of Appeals for the Second Circuit in *Commissioner* v. *Schwarz*, 74 F. (2d) 712. In that case the decedent had created a trust under which a stated portion of the income therefrom should be paid to his sister for life. The trust further provided that at the death of his sister—

> the Trustee shall pay, transfer, and deliver the principal of the said trust fund * * *

> to the Donor, if then living, and if not then living, in equal shares, per stirpes, to his descendants then living, and if neither he nor any descendant of his be then living, in equal shares to such of his brothers and sisters as shall be then living.

In the *Schwarz* case the Circuit Court of Appeals observed that the trust was created for the purpose of providing a fixed annual income to a beneficiary for life and held that the grantor clearly parted with no larger interest in the trust corpus. It distinguished such cases as *Reinecke* v. *Northern Trust Co.*, 278 U. S. 339; *May* v. *Heiner*, 281 U. S. 238; *McCormick v. Burnet*, 283 U. S. 784, and its own decision in *Commissioner* v. *Wallace*, 71 F. (2d) 1002 (C. C. A. 2d), certiorari denied, 293 U. S. 600, upon the ground that there the remainders were in form or substance vested to persons other than the grantors and not, as in the *Schwarz* case, contingent on the time of his death.

The facts in the instant case are substantially identical with those in the *Schwarz* case. Here, the clearly expressed purpose was to create a life estate for the benefit of the daughter, upon whose death, prior to that of the grantor, the trust should terminate and revert to the creator. Not until the death of the grantor prior to that of his daughter, did there arise in the ultimate beneficiaries the right to share in the estate. It is submitted that the conclusion of the Circuit Court of Appeals for the Eighth Circuit that the statute was not aimed

at this situation is contrary to the purpose of Congress and the decisions of this Court. *Klein* v. *United States*, 283 U. S. 231.

2. The existing situation is in need of clarification. The justification of this tax is the fact that the decedent retained an interest in the corpus of the trust, which did not cease until his death. Under the indenture the trustee was required to return the property to the decedent if his daughter died during the decedent's lifetime. While it must be noted that other cases presented comparable situations, it is submitted that the authorities are not in harmony. This is best illustrated by the decisions in the instant case and the *Schwarz* case, which rely upon and distinguish the same cases while involving substantially identical facts. See *McCormick* v. *Burnet, supra; Helvering* v. *Duke*, 290 U. S. 591; *Wallace* v. *Commissioner*, 27 B. T. A. 902, affirmed *per curiam*, 71 F. (2d) 1002 (C. C. A. 2d), certiorari denied, 293 U. S. 600. The first of these cases was decided *per curiam* upon the authority of *May* v. *Heiner, supra*, which did not involve the same situation.

The question in *May* v. *Heiner, supra*, was whether the value of a trust created by the decedent under which she was enjoying the income for life could properly be included within her gross estate. It dealt with a situation where the decedent had an interest in the trust income but no interest in the trust corpus. In the *McCormick* case, *supra*, the Government contended that the decedent had

retained an interest in the corpus as well as in the income, but it was heard with and decided by this Court at the same time as *Morsman* v. *Burnet,* 283 U. S. 783, and *Burnet* v. *Northern Trust Co.,* 283 U. S. 782, in each of which an interest in the income but not in the corpus was retained by the decedent. All three cases were decided at the same time by *per curiam* opinions on the authority of *May* v. *Heiner.* *May* v. *Heiner* was in point with respect to the *Morsman* and *Northern Trust* cases. It was also in point with respect to the retained interest in the income in the *McCormick* case, but it had no application to a retained interest in the corpus. The *McCormick* case was heard on February 27, 1931, and decided *per curiam* on March 2, 1931. Moreover, the limitation in the *McCormick* case was more remote than in the case at bar. In the former the trust corpus could revert only if Mrs. McCormick, who was then approximately 88 years of age, outlived three children, while here it was provided that the trust corpus would revert if the decedent outlived one daughter.

The affirmance of the *Duke* case by a divided court shows that the principles of law involved were not agreed upon by a majority of the Justices sitting, and prevents the case from being an authority. *Hertz* v. *Woodman,* 218 U. S. 205, 213–214. This division in the Court is reflected in the existing uncertainty with respect to the taxability of trusts containing provisions similar to that in the case at bar.

The *Wallace* case, *supra*, affirmed *per curiam* by the Circuit Court of Appeals, was decided by the Board of Tax Appeals on the ground that under New York law the daughter took a vested remainder by the execution of the trust instrument, and that the interest of the decedent in the property rights fixed by that instrument "must be determined by the laws of the place where the estate is to be administered." The *Wallace* case differs from the instant one in that there the remainder was in the first instance given to another and to the grantor only if that other died before the termination of the grantor's life estate, while here the remainder is given in the first instance to the grantor and to others only if the grantor died before the termination of the life estate.

Since the decision of the *McCormick* case, this Court has sustained the decision of a state court that a similar statute "recognized the distinction between taking effect in possession or enjoyment and vesting in right, title or interest, and intended to reach a shifting of the enjoyment of property, although such shifting followed necessarily from a prior transfer of title *inter vivos.*" *Guaranty Trust Co.* v. *Blodgett*, 287 U. S. 509, 512. Since this Court declared (p. 513) "That such a tax does not conflict with any provision of the federal Constitution", it is evident that the only question for decision here is whether the tax asserted was within the intendment of Congress.

We submit that Congress intended to reach every substitute for a testamentary disposition. Cf. *Milliken* v. *United States*, 283 U. S. 15, 23. "The quality which brings the transfer within the statute is indicated by the context and manifest purpose." *United States* v. *Wells*, 283 U. S. 102, 116. The statute deals with transfers intended to take effect in possession or enjoyment in the same subsection with transfers in contemplation of death. In neither case was Congress dealing with the technical transfer of rights upon death. Transfers in contemplation of death are completed *inter vivos* but are nevertheless subject to an estate tax. Taxable transfers to take effect in possession or enjoyment at or after death do not depend upon the transfer of the right but upon the transfer of the possession or enjoyment. That obviously occurs at death where, as here, the remainder is contingent. *Sargent* v. *White*, 50 F. (2d) 410 (C. C. A. 1st).

In *Reinecke* v. *Northern Trust Co., supra*, this Court held that the words "to take effect in possession or enjoyment at or after his death" include interests "passing from the possession, enjoyment, or control of the donor at his death." We submit that such transfers include any case where, as here, death is the occasion of the shifting of the enjoyment of property—the economic benefits thereof or economic interests therein. *Tyler* v. *United States*, 281 U. S. 497. So long as the privilege of making a transfer has not been fully exercised, it may be reached by the tax (*Chase Nat.*

Bank v. *United States*, 278 U. S. 327), and Congress intended to reach it.

3. While the considerations in Point 2 were presented to this Court in the petition for certiorari in the *Wallace* case, *supra*, there was then no square conflict of decisions in the circuit courts of appeals such as now appears. Moreover, the Government in the *Wallace* case sought to impose a tax upon the whole value of the trust property, whereas the tax here involved is limited to one upon the value of the remainder.

CONCLUSION

It is respectfully submitted that certiorari should be granted in the instant case because of the conflict between two Circuit Courts of Appeals and further, that upon hearing there will be present an opportunity to settle the uncertainty regarding the application of the prior decisions of this Court. The lower Federal courts are not disposed to attempt to resolve the doubt and a review by this Court would be in the public interest. The existing confusion is detrimental to the proper administration of the revenue laws and promotes litigation.

STANLEY REED,
Solicitor General.

APRIL 1935.

APPENDIX

Revenue Act of 1924, c. 234, 43 Stat. 253:

> SEC. 302. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—
>
> * * * * *
>
> (c) To the extent of any interest therein of which the decedent has at any time made a transfer, or with respect to which he has at any time created a trust, in contemplation of or intended to take effect in possession or enjoyment at or after his death, except in case of a bona fide sale for a fair consideration in money or money's worth.
>
> * * * * *
>
> (h) Subdivisions (b), (c), (d), (e), (f), and (g) of this section shall apply to the transfers, trusts, estates, interests, rights, powers, and relinquishment of powers, as severally enumerated and described therein, whether made, created, arising, existing, exercised, or relinquished before or after the enactment of this Act. (U. S. C., Title 26, Sec. 1094.

Treasury Regulations 68, promulgated under the Revenue Act of 1924:

> ART. 17. *General.*—All transfers at any time made by the decedent, other than bona fide sales for a fair consideration in money or money's worth, which were intended to take effect in possession or enjoyment at or after his death, are taxable, and the value, as

of the date of the decedent's death, of the property so transferred must be returned as a part of the gross estate.

ART. 18. * * *

Where there was no reservation of income or an annuity but it was intended that possession or enjoyment of the transferred property, or a portion thereof, should be postponed until at or after decedent's death, then the value of the entire property or of such portion, as the case may be, should be included in the gross estate. Thus a gift of the principal intended to take effect either in possession or enjoyment at or after the decedent's death is taxable, although the income or annuity was payable during the decedent's life to some-one other than himself. * * *

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No. 25

In the Supreme Court of the United States

OCTOBER TERM, 1935

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

ST. LOUIS UNION TRUST COMPANY, AS SUCCESSOR TRUSTEE TO LIBERTY CENTRAL TRUST COMPANY, AS SOLE RESIDUARY LEGATEE AND DISTRIBUTEE OF THE AMERICAN ESTATE OF WILLIAM J. ORTHWEIN, DECEASED, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE PETITIONER

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In the Supreme Court of the United States

OCTOBER TERM, 1935

No. 25

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, petitioner

v.

ST. LOUIS UNION TRUST COMPANY, AS SUCCESSOR TRUSTEE TO LIBERTY CENTRAL TRUST COMPANY, AS SOLE RESIDUARY LEGATEE AND DISTRIBUTEE OF THE AMERICAN ESTATE OF WILLIAM J. ORTHWEIN, DECEASED, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The findings of fact and opinion of the Board of Tax Appeals (R. 26) are reported in 28 B. T. A. 107. The opinion of the Circuit Court of Appeals (R. 59) is reported in 75 F. (2d) 416.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered January 17, 1935. (R. 62–63.) The petition for a writ of certiorari was filed April 17, 1935, and granted May 20, 1935. (R. 64.) The jurisdiction of this Court is conferred by Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED

The decedent created an *inter vivos* trust with directions (1) to pay the income therefrom for life to a daughter, upon whose death prior to that of the creator the trust should terminate and the corpus be delivered to the grantor; or (2) if the grantor should predecease the daughter, for continuance of the trust with disposition of the income and corpus as provided in the trust instrument.

The question is whether the interest of the decedent therein should be included in his gross estate as a transfer "intended to take effect in possession or enjoyment at or after his death", under Section 302 (c), Revenue Act of 1924.

STATUTE AND REGULATIONS INVOLVED

The statute and regulations involved will be found in the Appendix, *infra*, pp. 25–28.

STATEMENT

The facts in this case, as stipulated (R. 39–55) and found by the Board of Tax Appeals (R. 28–31), may be summarized as follows:

The decedent, William J. Orthwein, a citizen of the United States, died on September 4, 1925, then a resident of Switzerland.

The decedent, by indenture dated January 1, 1920 (R. 48), created an *inter vivos* trust, with which we are herein concerned, naming as trustee the Mercantile Trust Company, which was succeeded by the Mercantile Commerce Bank & Trust Company, one of the respondents herein. The Commissioner included in the decedent's taxable estate the then value of decedent's interest in the assets which constituted the corpus of this *inter vivos* trust.

Under the will of the decedent, executed November 28, 1923, he created another trust, of the American estate of the decedent, the provisions of that trust not being involved in this proceeding. He named as trustee of the trust under the will the Liberty Central Trust Company, which was also named as executor of the American estate. The Liberty Central Trust Company, as executor, made final distribution to itself as trustee of the trust created by the will, and was discharged as executor. Thereafter the St. Louis Union Trust Company succeeded the Liberty Central Trust Company as trustee under the will. The St. Louis Union Trust Company, as sole distributee in its trust capacity of the residue of the estate, would be liable to pay any additional estate tax on the *inter vivos* trust, and is therefore named as a respondent herein.

By the indenture creating the *inter vivos* trust the decedent transferred various securities to the

trustee to hold, manage, and dispose of as an active trust and to pay the net income thereof to the decedent's daughter, Alma Feraldo, during her life and upon her death to make disposition thereof as provided in the indenture.

The indenture provided that if the daughter predeceased the grantor the trust should terminate and the trust estate should be paid over to the grantor, if living. The trustee was given discretionary power to terminate the trust when the trustee might deem it wise.

The trust indenture further provided that upon the death of the grantor's daughter, if the grantor were not then living, the income, or as much thereof as the trustee deemed wise, should be used for the benefit of the grantor's wife if living, and after her death and the death of the daughter, if the daughter were survived by a child or children, then for their equal benefit during their minority, and upon their majority, the corpus of the trust estate was to be distributed to them or the survivors of them. It contained a further provision for disposal of the trust estate to the next of kin of grantor in the event of the daughter leaving neither the grantor, his wife, nor any children of her own surviving her. (R. 52–53.) It also provided that during the lifetime of the daughter the grantor should have no further individual or beneficial interest in the transferred property. (R. 48.)

The daughter did not predecease the decedent but survived him. The value of the trust securities

at the date of decedent's death was $101,421.24 and the then value of the decedent's remainder interest subject to the daughter's life estate was $34,544.06. (R. 30–31.)

The Commissioner, in determining the deficiency claimed herein, included the remainder interest at that value. Upon review, the Board of Tax Appeals decided against the Commissioner. (R. 31–33.) The Circuit Court of Appeals affirmed the decision of the Board. (R. 60–63.)

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

1. In holding that the value of the decedent's interest in the trust property should not be included in the gross estate of the decedent under Section 302(c), Revenue Act of 1924, as a transfer intended to take effect in possession or enjoyment at or after death.

2. In affirming the Board of Tax Appeals on the authority of *Reinecke* v. *Northern Trust Co.*, 278 U. S. 339; *May* v. *Heiner*, 281 U. S. 238; and *McCormick* v. *Burnet*, 283 U. S. 784.

3. In affirming the Board of Tax Appeals.

SUMMARY OF ARGUMENT

The decedent retained an interest in the corpus of the trust property which did not pass until his death. The court below denominated such interest as a mere possibility of reverter and upon that ground denied application of the statute. This action, we submit, is contrary to the principles an-

nounced by this Court governing the construction and application of the controlling provision. The cases relied upon by the court below are believed to be without authority in the circumstances, and do not require an affirmance of the decision here.

Proper construction and application of the statute to facts not distinguishable from those here, was just recently given by the Second Circuit Court of Appeals in *Commissioner* v. *Schwarz*, 74 F. (2d) 712. The facts in the instant case require a like conclusion.

We submit that the grantor herein retained an interest in the property the same in substance as that retained by the grantor in the case of *Klein* v. *United States*, 283 U. S. 231, and that the retention of this interest by the grantor herein made the transfer one intended to take effect on the grantor's death within the meaning of Section 302(c) of the Revenue Act of 1924, just as the retention of the similar interest by the grantor in the *Klein* case brought the transfers within the same statutory provision. If Klein survived another, the property was his; if he died first, the property went to another. If, here, the grantor survived another, the property was his; if he died first, the property went to others. Similarly, in both cases, the facts meet the test prescribed by this Court in *Tyler* v. *United States*, 281 U. S. 497, 503, namely, "whether the death has brought into being or ripened for the survivor, property rights of such character as to

make appropriate the imposition of a tax upon that result * * *."

We therefore contend that the decision in this case is controlled by this Court's decision in *Klein* v. *United States*, where the question involved is not fairly distinguishable from that raised here.

ARGUMENT

THE SETTLOR RETAINED A SUBSTANTIAL INTEREST IN THE CORPUS OF THE TRUST PROPERTY, WHICH INTEREST PASSED TO OTHERS AT HIS DEATH. IN THAT SITUATION THE STATUTE IMPOSES A TAX

This case involves the construction and application of Section 302(c) of the Revenue Act of 1924, *infra*, p. 25, which provides as follows:

> The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—
>
> * * * * *
>
> (c) To the extent of any interest therein of which the decedent has at any time made a transfer, or with respect to which he has at any time created a trust, in contemplation of or intended to take effect in possession or enjoyment at or after his death, * * *.
>
> (U. S. C., Title 26, Sec. 1094.)

This provision of law was first included in Section 202(b) of the Revenue Act of 1916, and also included in Section 402(c) of the Revenue Act of

1918, in Section 402(c) of the Revenue Act of 1921, and in Section 302(c) of the Revenue Act of 1926, which continued in effect under the 1928 Act. The provision was amended in 1931 by H. J. Res. No. 529, *infra*, p. 27, and as amended remained in effect under the Revenue Acts of 1932 and 1934.

The decedent died on September 4, 1925, while Section 302(c) of the Revenue Act of 1924 was in effect. The trust was created by the deed of January 1, 1920, while the similar provision of the Revenue Act of 1918 was effective. As the language in question was in force when the trust was established as well as when the decedent died, no question of constitutionality is involved. *Milliken* v. *United States*, 283 U. S. 15; *Klein* v. *United States*, 283 U. S. 231.

By the terms of the deed the settlor transferred certain property to a trustee with directions to pay the income therefrom to a daughter during her lifetime. Upon the death of the daughter, if grantor was still living, the trust was to terminate and the entire estate be delivered to him. If the grantor died during his daughter's lifetime, then upon the termination of her life estate the corpus was to be distributed to the child or children of the daughter, subject to certain conditions not important here. (R. 48, 52-53.)

The Board of Tax Appeals and the court below found that the decedent did, by virtue of the provisions of the trust instrument, retain an interest in the corpus of the trust property. They denomi-

nated such interest as "reversionary" or "a possibility of reverter" and upon this ground held the interest was not intended to pass at the death of the grantor within the meaning of the statute. To support such conclusions this Court's decisions in *May* v. *Heiner,* 281 U. S. 238, and *McCormick* v. *Burnet,* 283 U. S. 784, were cited as pertinent and controlling. Obviously, *May* v. *Heiner,* in which the settlor reserved to himself no interest in the corpus, is not in point here. And, as stated hereinafter, we believe the *McCormick* case is without authority here.

The sole question presented in this case is whether the interest retained by the decedent in the corpus of the trust created by him should be included in his gross estate as a transfer "intended to take effect in possession or enjoyment at or after his death," within the meaning of Section 302(c), *supra.*[1]

[1] The respondents suggested in the lower court that by Article 11, Treasury Regulations 68, *infra*, p. 26, the Government interpreted Section 302(c) of the Revenue Act of 1924 as meaning that *contingent* interests, even when they were remainders, were not required by the Act to be included in the gross estate for the purpose of the estate tax. Such a conclusion is erroneous. The liability of Article 11, when examined in its proper context, relates not to Section 302(c), but to Section 302(a), which describes and numerates the classes of a decedent's property which shall be included in decedent's gross estate under that subdivision. This case arises under Section 302(c) (interpreted by Articles 17–18, *infra*, pp. 26–27), and is concerned with property which the decedent owned in fee during his lifetime and which he transferred in trust, retaining, however, an interest for himself.

Under the statute the thing taxed is the transmission of property, or an interest therein, from the dead to the living. *Heiner* v. *Donnan*, 285 U. S. 312, 322. The dominant purpose is to reach substitutes for testamentary dispositions and thus to prevent the evasion of the estate tax. *Nichols* v. *Coolidge*, 274 U. S. 531, 542; *Heiner* v. *Donnan*, *supra*.

In construing and giving effect to a related subsection of the statute, this Court declared, in *Tyler* v. *United States*, 281 U. S. 497, 502:

> Death duties rest upon the principle that death is the "generating source" from which the authority to impose such taxes takes its being, and "it is the power to transmit or the transmission or receipt of property by death which is the subject levied upon by all death duties." *Knowlton* v. *Moore*, 178 U. S. 41, 56, 57. * * * If the event is death and the result which is made the occasion of the tax is the bringing into being or the enlargement of property rights, and Congress chooses to treat the tax imposed upon that result as a death duty, even though, strictly, in the absence of an expression of the legislative will, it might not thus be denominated, there is nothing in the Constitution which stands in the way.
>
> The question here, then, is, not whether there has been, in the strict sense of that word, a "transfer" of the property by the death of the decedent, or a receipt of it by right of succession, but whether the death has brought into being or ripened for the

> survivor, property rights of such character as to make appropriate the imposition of a tax upon that result (which Congress may call a transfer tax, a death duty or anything else it sees fit), to be measured, in whole or in part, by the value of such rights.

In the instant case, the question for determination is similar. We maintain that since the right of the daughter's children (and other named beneficiaries) to take under the trust instrument depended upon the death of the grantor prior to that of his daughter, the death of the decedent was the "generating source" of "important and definite successions to the property rights" of these benficiaries in the corpus of the property transferred. Plainly, it enlarged their defeasible interest in the property into an indefeasible one. It is precisely such an enlargement or ripening of property interests for the benefit of the living which is the occasion for the tax. *Tyler* v. *United States, supra; Chase Nat. Bank* v. *United States,* 278 U. S. 327; *Porter* v. *Commissioner,* 288 U. S. 436, 444.

Under the law of Missouri, the jurisdiction governing the trust in the instant case, the decedent, it is submitted, created in himself a vested remainder subject to divestment by his death. The law there favors vested estates, and the rule is that estates shall be held to vest at the earliest possible period unless a contrary intention is clearly manifested in the grant. *Tindall* v. *Tindall,* 167 Mo. 218, 225, citing *Doe* v. *Considine,* 6 Wall. 458;

Heady v. *Hollman*, 251 Mo. 632, 638; *Green* v. *Irvin*, 309 Mo. 302, 306. Since the person was in existence (the grantor) who was first to take the remainder after the termination of the life estate, such interest became a vested one, subject only to divestment by his death. 2 Washburn, *Real Property*, 4th ed., pp. 548, 550, 551.

Certainly, under the local law, the children of the life tenant, and the other named beneficiaries, cannot be said to have received vested remainders under the deed, since their right to take at all was contingent not only upon their surviving the life tenant, but also upon the decedent's death prior to that of the life tenant. *Hartnett* v. *Langan*, 282 Mo. 471. Cf. *Wallace* v. *Commissioner*, 27 B. T. A. 902, affirmed *per curiam*, 71 F. (2d) 1002 (C. C. A. 2d), certiorari denied, 293 U. S. 600. Moreover, there was a further contingency with respect to the interests of the life tenant's children (and other named beneficiaries) since their rights were subject to obliteration at any time if the trust was terminated by the trustee prior to the death either of the grantor or the life tenant.

But, however the remainder interests may be technically described, it is perfectly clear that under the local law the decedent retained a substantial property interest which, upon his death, passed to the other remaindermen.

This trust contained a specific provision that if the daughter died while the grantor was still living the trust should immediately cease and all the

property then held in trust should revert to the grantor without qualification or restriction. Only in the event that the grantor predeceased his daughter did there arise in the children of the daughter (and other named beneficiaries) the right to take under the trust instrument. Until the grantor's death, the interests of these contingent remaindermen in the corpus were not final and complete. They might be obliterated at any time by the life tenant's death prior to that of the grantor. This qualification was not removed until the grantor's death and then only because of his death. We submit, therefore, that as to the corpus of the trust the transfer of the remainders was intended to take effect at the grantor's death.

This conclusion is compelled, we submit, by this Court's decision in *Klein* v. *United States*, 283 U. S. 231. The question involved in that case was the proper construction of Section 402(c) of the Revenue Act of 1918, which is in the same language as Section 302(c) of the Revenue Act of 1924 presented here. In that case a husband conveyed property to his wife for life with the provision that if she should survive her husband then she should take the property in fee simple. The husband died before the wife, and the Commissioner of Internal Revenue assessed a tax against the husband's estate on the ground that the transfer was one "intended to take effect in possession or enjoyment at or after" the husband's death. This

Court upheld the Commissioner's action, saying (p. 234):

> * * * It is perfectly plain that the death of the grantor was the indispensable and intended event which brought the larger estate into being for the grantee and effected its transmission from the dead to the living, thus satisfying the terms of the taxing act and justifying the tax imposed.

The substantial effect of the limitation in the instant case is precisely the same as that involved in the *Klein* case. In the instant case the death of the grantor before his daughter removed the possibility of his retaking the property, and hence his death was the "indispensable and intended event" upon which the continued existence of the trust depended, for the benefit of the interests subsequent to the life estate. Similarly, in the *Klein* case, the death of the husband before the wife was the event which insured her holding the property free of the possibility of its reverting to him.

The lower court, however, distinguished the *Klein* case on the ground that there (R. 62)—

> the legal title was retained by the grantor and passed to the grantee with the grantor's death, while here the grantor parted with the title and all beneficial interest in the property, and retained no right with respect thereto that would pass to anyone as the result of his death. In the *Klein* case, death

> was the generating source of title, while in this case the trust instrument was the source of title and death merely destroyed a possibility that the trust property might revert to the grantor.

It is plain, we submit, that the distinction made by the lower court is one merely of title, and looks solely to the form rather than the substance of the conveyance. We submit that there, as here, any title acquired by the grantee was pursuant to the instrument of conveyance (deed or trust); and that in both cases death was the occasion for the ripening or enlargement of the interest of the grantee theretofore acquired under the instrument. Furthermore, any technical difference, under real property law, in the interest conveyed, is not controlling in this situation; for, as this Court stated in the *Klein* case, *supra*, "*nothing is to be gained by multiplying words in respect of the various niceties of the art of conveyancing or the law of contingent and vested remainders.*" Death is the generating source of economic enjoyment, whether the continuance of a trust (as here) or the vesting of title (as in the *Klein* case) is dependent on that event. Since a distinction between the two types of limitation is purely formal and has no effect upon the substantial interests of the parties to the transaction, the decisions of this Court make it plain that it can have no significance in the application of the taxing statutes.

This Court has repeatedly stated that it is the substantial effect of transactions that is important for the purpose of taxation and not the form in which they are cast. *Corliss* v. *Bowers*, 281 U. S. 376, 378; *Tyler* v. *United States*, 281 U. S. 497, 503; *Burnet* v. *Harmel*, 287 U. S. 103; *Palmer* v. *Bender*, 287 U. S. 551; *Burnet* v. *Guggenheim*, 288 U. S. 280, 283–284; *Reinecke* v. *Smith*, 289 U. S. 172, 177.

The principle of the *Klein* case has been applied, and regarded as controlling, in the recent case of *Commissioner* v. *Schwarz*, 74 F. (2d) 712 (C. C. A. 2d), in which the facts were substantially the same as in the instant case. The decedent transferred property in trust, a fixed amount of the income from which was to be paid annually to his sister during her life. He reserved to himself a remainder over after termination of the life estate; but if his death occurred prior to the termination of the life estate, his remainder interest should go to his descendants, and if no descendants be then living, to his brothers and sisters then living. Since he died prior to termination of the life estate, the Circuit Court of Appeals held that it was proper to include in his gross estate the value of the remainder interest which passed at his death to his descendants, stating:

> The death of this grantor was the indispensable and intended event which effected a transmission of a remainder interest from

> the dead to the living (*Klein* v. *United States, supra*), and the grant of the remainder interest in the trust fund was necessarily "intended to take effect in possession or enjoyment at or after" decedent's death within the meaning of the statute, section 302(c). • • •

The court there distinguished the very cases cited by the court below in the instant case to support its conclusion herein. In the *Schwarz* case, the court said (p. 713):

> This case is to be distinguished from the class of cases where property is transferred in trust with remainders over to persons other than the grantor and where no remainder is reserved in the grantor.

A like application of the *Klein* decision also has been made in the following cases. In *Sargent* v. *White*, 50 F. (2d) 410 (C. C. A. 1st), a husband created a trust, reserving the income for life and providing that if he survived his wife the trust should cease, but if she survived him she should have the property. The husband died before the wife, and the court held, relying on the *Klein* case, that the property was taxable as a part of his estate as a transfer intended to take effect in possession or enjoyment at or after death. A similar result was reached in *Union Trust Co.* v. *United States*, 54 F. (2d) 152 (C. Cls.), certiorari denied, 286 U. S. 547. See also *Hoblitzelle* v. *United States*, 3 F. Supp. 331, 334 (C. Cls.).

Two other cases have been before this Court involving the application of the pertinent subsection of the statute to facts substantially the same as those now involved, viz., *McCormick* v. *Burnet*, 283 U. S. 784, and *Helvering* v. *Duke*, 290 U. S. 591. For the reasons hereinafter set forth, it is submitted those cases do not require a result different from that contended for on behalf of the Government in the instant case.

In the *McCormick* case the settlor created a trust in which it was provided (see 43 F. (2d) 277–278) that a certain amount of the income should be paid to the settlor during her life. It was further provided that on the settlor's death the income should be paid to the settlor's three children. The settlor might terminate the trust at any time by an instrument in writing signed by her and by one or more of her three children, and after the settlor's death the trust might be terminated by a majority in interest of the beneficiaries. It was further provided that the trust should terminate in any event upon the death of the last survivor of the three children. Upon a termination of the trust the trust property was to be paid to the settlor if she was then living, and if she was not then living it was to be distributed to others as provided in the trust instrument. The *McCormick* case thus involved a limitation somewhat similar to that presented here, since the trust was to cease and determine when all three

children died and Mrs. McCormick might survive them.[2]

The circumstances surrounding the decision indicate, however, that this Court's *per curiam* decision was not intended to be a decision on the question involved in the instant case. The *McCormick* case was argued together with *Burnet* v. *Northern Trust Co.*, 283 U. S. 782, and *Morsman* v. *Burnet*, 283 U. S. 783. All three of these cases involved the common question of whether the reservation of a *life interest* by the settlor of a trust made the transfer subject to taxation under Section 402(c) of the Revenue Act of 1921, or Section 302(c) of the Revenue Act of 1924. This was a question upon which there existed a conflict of decisions among Circuit Courts of Appeals. All three cases were decided together, three days after their argument, in identical *per curiam* opinions based solely on the authority of *May* v. *Heiner*, 281 U. S. 238. *May* v. *Heiner* was an authority in point on the question of the effect of the reservation of a life interest by the grantor of a trust. But it had no connection whatever with the issue which was incidentally raised in the brief in the *McCormick* case concerning the provision in the trust instrument to the effect that

[2] The probability of the contingency happening in the *McCormick* case was much more remote than that here. A parent has far less chance of surviving three children than of surviving one. Mrs. McCormick was 83 years of age when the trust was created.

the grantor would regain the trust property if she survived her three children. Since the three cases involved a common question and were decided in identical *per curiam* decisions on the authority of a case relating solely to that question, we submit that the decision in the *McCormick* case can not be regarded as having disposed of the question which is now before the Court.

That this is true is made plain, we submit, by this Court's decision in *Klein* v. *United States*, 283 U. S. 231, *supra*. The *Klein* case was argued on the same day as the *Northern Trust*, *Morsman*, and *McCormick* cases, and was decided a few weeks later. No mention of the *McCormick* decision appears in the *Klein* opinion. If this Court considered the *Klein* case as distinguishable from the *McCormick* case only on so fine a point as the form of the limitation, we feel confident that it would have rested its decision upon that technical and formal distinction. That it intended no such narrow ruling appears plain from the language of the opinion.

In *Helvering* v. *Duke*, *supra*, the settlor conveyed to his daughter and her descendants, upon certain conditions. Each of the trust instruments contained a specific provision that if the daughter died while Duke was living the trusts should immediately cease and all the property then held in trust should revert to the settlor without qualification. The transfers by their terms did not become complete unless the settlor Duke died while

his daughter was still living. This Court divided equally (Mr. Chief Justice Hughes not sitting), resulting in an affirmance of the decision of the lower court, which in turn had affirmed a decision of the Board of Tax Appeals holding the transfers not taxable. The result in the *Duke* case is not authoritative upon the specific question involved here and has no binding effect as a precedent. *Hertz* v. *Woodman*, 218 U. S. 205. This Court would scarcely have so divided in the *Duke* case if the *McCormick* decision had settled the question.

Since neither the *McCormick* nor *Duke* case can be considered as having decided the issue herein, and since no other decision of this Court, with the exception of the *Klein* case, deals with an interest retained in the corpus of transferred property, the adoption of the suggested construction of the statute will not require the reversal or modification of any prior decision.

Reinecke v. *Northern Trust Co.*, 278 U. S. 339, relied upon by the court below, is obviously not in point. In the trusts involved therein, the settlor did not reserve an interest to himself, nor was there any possibility of the corpus reverting to him. The decision of this Court in that case related to the effect of the settlor's power of revocation, and his control over the transferred property.

In *Wallace* v. *Commissioner*, 71 F. (2d) 1002, certiorari denied, 293 U. S. 600, the decedent transferred certain property to a trustee, to pay the income thereof to her during her life and upon her

death to pay the corpus of the trust over to her daughter, "if she be living"; in the event the daughter predeceased the grantor, the property reverted to the grantor. Thus, the remainder was in the first instance given to another and to the grantor only if that other died before the termination of the grantor's life estate. The Board of Tax Appeals held (affirmed *per curiam* by the Circuit Court of Appeals for the Second Circuit) that under New York law the daughter took a vested remainder by the execution of the trust instrument, and that the interest of the decedent in the property rights fixed by that instrument "must be determined by the laws of the place where the estate is to be administered."

The same (Second) Circuit Court, in deciding the more recent *Schwarz* case, *supra*, upon facts not essentially different from those present here, distinguished the *Wallace* case (along with the *Northern Trust Co.*, *May*, and *McCormick* cases, *supra*) upon the ground that "there the remainders were in form or substance vested to persons other than the grantors and not * * * contingent on the time of his death."

The *Duke* case, *supra*, was distinguished on the ground that in that case there was a mere possibility of reverter, whereas, in the *Schwarz* case the trust was created for the purpose of providing a fixed annual income to a beneficiary for life and the grantor clearly parted with no larger interest in the trust corpus. Accordingly, it was there held

that the grantor's death affected the transmission of his remainder interest to his heirs and justified the tax. We submit that a similar situation exists in the case at bar. Here was a trust created for the benefit of the daughter. During the lifetime of the grantee her sole interest in the trust was to receive the income; during his lifetime she had no interest in the corpus. The corpus was to go to the decedent if the daughter died during his lifetime. Except for the circumstance that the trustee held the naked legal title, the situation is not essentially different from that where the decedent had himself retained the corpus and granted a life estate.

In *Burnet* v. *Guggenheim*, 288 U. S. 280, 286, this Court declared that "there has been a steady widening of the concept of a transfer for the purpose of taxation" under the provisions of the Federal estate tax. *Porter* v. *Commissioner*, 288 U. S. 436; *Gwinn* v. *Commissioner*, 287 U. S. 224; cf. *Tyler* v. *United States*, *supra*.

It is submitted that application of the statute does not depend upon the strict rules of property or the technical classification of the interests conveyed by the trust instrument. Decision here does not depend upon the niceties of the art of conveyancing; it is enough if the death of the grantor was the indispensable and intended event which ripened or brought the larger estate into being for the grantee, thus effecting a transmission from the

dead to the living. *Klein* v. *United States, supra.* If the beneficiaries' interests were defeasible and the decedent's death rendered them indefeasible, there is a transfer within the purview of the statute.

Clearly, the instant case presents such a situation. Until the decedent's death the interests of the other designated remaindermen were contingent, in fact and substance as well as in law. Upon his death, the retained interest in the corpus passed from the decedent; and the other remaindermen's interests were increased accordingly. It is precisely such an enlargement or ripening of property interests for the benefit of the survivors which is taxable under the statute. *Tyler* v. *United States, supra.*

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the court below should be reversed.

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SEPTEMBER, 1935.

APPENDIX

Revenue Act of 1924, c. 234, 43 Stat. 253:

SEC. 302. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—

* * * * * *

(c) To the extent of any interest therein of which the decedent has at any time made a transfer, or with respect to which he has at any time created a trust, in contemplation of or intended to take effect in possession or enjoyment at or after his death, except in case of a bona fide sale for a fair consideration in money or money's worth. * * *

* * * * * *

(h) Subdivisions (b), (c), (d), (e), (f), and (g) of this section shall apply to the transfers, trusts, estates, interests, rights, powers, and relinquishment powers, as severally enumerated and described therein, whether made, created, arising, existing, exercised, or relinquished before or after the enactment of this Act.

(U. S. C., Title 26, Sec. 1094.)

Treasury Regulations 68, promulgated under the Revenue Act of 1924:

GROSS ESTATE—GENERAL

SEC. 302 * * *

(a) To the extent of the interest therein of the decedent at the time of his death which after his death is subject to the payment of

the charges against his estate and the expenses of its administration and is subject to distribution as part of his estate:

* * * * * * *

ART. 11. *Specific property to be included.*—

* * * * * * *

The value of a vested remainder should be included in the gross estate. Nothing should be included, however, on account of a contingent remainder where the contingency does not happen in the lifetime of the decedent, and the interest consequently lapses at his death. * * *

* * * * * * *

TRANSFERS INTENDED TO TAKE EFFECT IN POSSESSION OR ENJOYMENT AT OR AFTER DEATH

ART. 17. *General.*—All transfers at any time made by the decedent, other than bona fide sales for a fair consideration in money or money's worth, which were intended to take effect in possession or enjoyment at or after his death, are taxable, and the value, as of the date of the decedent's death, of the property so transferred must be returned as a part of the gross estate.

ART. 18. * * *

Where there was no reservation of income or an annuity but it was intended that possession or enjoyment of the transferred property, or a portion thereof, should be postponed until at or after decedent's death, then the value of the entire property or of such portion, as the case may be, should be included in the gross estate. Thus a gift of the principal intended to take effect either in possession or enjoyment at or after the decedent's death is taxable, although the income or annuity was payable during the de-

cedent's life to some one other than himself. * * *

H. Joint Resolution 529 (71st Cong., 3d sess.):

Resolved, * * * That the first sentence of subdivision (c) of section 302 of the Revenue Act of 1926 is amended to read as follows:

"(c). To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, including a transfer under which the transferor has retained for his life or any period not ending before his death (1) the possession or enjoyment of, or the income from, the property or (2) the right to designate the persons who shall possess or enjoy the property or the income therefrom; except in case of a bona fide sale for an adequate and full consideration in money or money's worth."

Approved, March 3, 1931.

[c. 454, 46 Stat. 1516.]

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1934.

GUY T. HELVERING, Commissioner of Internal Revenue,
Petitioner,

v.

ST. LOUIS UNION TRUST COMPANY, as Successor Trustee to LIBERTY CENTRAL TRUST COMPANY, as Sole Residuary Legatee and Distributee of the American Estate of WILLIAM J. ORTHWEIN, Deceased, et al.

BRIEF IN OPPOSITION

TO PETITION OF GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

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No. 879.

IN THE

Supreme Court of the United States.

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Petitioner,

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PRELIMINARY STATEMENT.

This brief is respectfully submitted on behalf of the respondents in opposition to the pending "Petition for a Writ of Certiorari" filed for Guy T. Helvering, Commissioner of Internal Revenue, by the Solicitor General.

As stated in the petition, a writ is sought to review the judgment of the Circuit Court of Appeals for the Eighth Circuit, 75 F. (2d) 416, entered in the above entitled cause January 17, 1935, affirming the decision of the United States Board of Tax Appeals (R. 26; 28 B. T. A. 107).

THE QUESTION PRESENTED.

The only question is whether the value of the decedent's interest—a mere possibility of a reverter—in the corpus of a trust estate created by his trust conveyance *inter vivos* should, although the possibility never became an actuality, be included in his gross estate as a transfer "intended to take effect in possession or enjoyment at or after his death," under Section 302 (c) of the Revenue Act of 1924.

STATUTE AND REGULATIONS INVOLVED.

The applicable statute and regulations as quoted in the appendix to the petition (pp. 12, 13) are correct, but should be supplemented by the following portion of Article 11 of Regulations 68, which was in force at the death of decedent (italics ours):

> "The value of a *vested* remainder should be included in the gross estate. *Nothing should be included,* however, *on account of a contingent remainder* where *the contingency does not happen in the lifetime of decedent,* and the *interest consequently lapses at his death.*"

STATEMENT OF THE CASE.

The facts stated in the petition (pp. 2-5) are substantially correct, but should be supplemented by the following:

The case was tried before the Board of Tax Appeals and submitted on a "Stipulation of Facts" filed with the Board (Rec. 27, 39, 46).

This stipulation includes (as "Exhibit B" thereto) a copy of the Trust Indenture made by decedent, William J. Orthwein, dated January 1, 1920 (Rec. 48-55).

This indenture, in addition to the provisions stated in the petition, contained the following express declaration of the grantor's intent in making it:

> "The grantor * * * desires by this Indenture to make for the benefit of his daughter * * * as the life beneficiary of the trust hereby created, an absolute and irrevocable gift and settlement of the property hereinafter described, so that the grantor shall during the life of his said daughter have no further individual or beneficial interest therein, etc. * * *" (Rec. 48).

The grantor retained unto himself no power of revocation or alteration. The only power to end the trust during the life of the grantor vested in the trustee alone (Rec. 52). The only person to whom power was given to advise or direct the trustee in respect of "the purchase, sale or exchange of assets" of the trust estate was the grantor's daughter (Rec. 51).

The daughter of grantor was born on February 1, 1891. When the indenture was made the grantor was sojourning in Switzerland (Rec. 47). When he died he was a resident of Switzerland, domiciled there (Rec. 39).

The trust was in existence when the grantor died, and the trust is still alive (Rec. 44).

Neither of the contingencies upon the happening of either of which the trust would have reverted to the grantor ever happened; i. e., (1) the trust was not terminated by the trustee during the grantor's life, (2) nor did his daughter predecease the grantor pending the trust.

The contention for petitioner below, as stated by the Circuit Court of Appeals (*Helvering, Commissioner, v. St. Louis Union Trust Co.*, 75 F. [2d] 416, at 417-418), was:

> "That the decedent, in creating the trust, had reserved to himself a substantial interest in the trust property in the nature of a vested remainder, and that, since his death had the effect of making available to others this interest which might have reverted to him during his lifetime, the value thereof was properly taxable as a part of his estate, in view of Klein v. United States, 283 U. S. 231, 51 S. Ct. 398, 75 L. Ed. 996."

In deciding against this contention the Circuit Court of Appeals held (75 F. [2d], at 418): That decedent, by the trust instrument, had "parted with the legal title to the trust property, and to all beneficial interest therein during the life of the trust, and did so irrevocably"; that his death "merely changed the possibility that the property would revert to him into an impossibility," and that therefore grantor's death was not the generating source of the title that passed to others by the indenture, but it merely destroyed the possibility that the property might revert to him.

SUMMARY OF THE ARGUMENT; POINTS AND AUTHORITIES RELIED ON.

I.

The "reasons for granting the writ," assigned in the petition, are without merit.

(1) The decision of the Circuit Court of Appeals in the instant case is not in conflict with the *Schwarz* case, as contended in the petition.

Helvering, Commissioner, v. St. Louis Union Trust Co., 75 F. (2d) 416 (C. C. A. 8);
Commissioner v. Schwarz, 74 F. (2d) 714 (C. C. A. 2).

(a) Because the facts are substantially different and the cases clearly distinguishable.

Commissioner v. Schwarz, 74 F. (2d) 712, at 713-714;
Helvering, Com'r, v. St. Louis Union Trust Co., 75 F. (2d) 416, at 418.

(b) Because in both cases the courts make the same distinction and thereby avoid conflict in doctrine.

Commissioner v. Schwarz, 74 F. (2d) 712, at 713-714;
Helvering, Com'r, v. St. Louis Union Trust Co., 75 F. (2d) 416, at 418.

(2) The existing situation in respect of the doctrine applicable to the instant case is not in need of clarification, as contended in the petition.

May v. Heiner, 281 U. S. 238, at 243;
McCormick v. Burnet, Com'r, 283 U. S. 784;

McCormick v. Commissioner, 13 B. T. A. 423, at 437;
Commissioner v. McCormick, 43 F. (2d) 277, at 279;
Helvering v. Duke, 290 U. S. 591;
Commissioner v. Duke, 62 F. (2d) 1057, at 1058;
Duke v. Commissioner, 23 B. T. A. 1104, at 1113-1114;
Commissioner v. Wallace, 71 F. (2d) 1002, certiorari denied, 293 U. S. 600;
Wallace v. Commissioner, 27 B. T. A. 902, at 913;
Klein v. U. S., 283 U. S. 231, 234.

The decision in the instant case is in accord with Article 11 of Regulations 68, applicable to the Revenue Act of 1924.

(3) (a) The first reason (a conflict of decisions) suggested in point 3 of the petition has been answered above.

(b) The second reason suggested in point 3, relating to the differing interests whose value is sought to be taxed in the *Wallace* case and in the instant case, respectively, is irrelevant to the controlling questions decided in the two cases.

H.

Conclusion.

THE ARGUMENT.

I.

It is respectfully submitted that the "reasons for granting the writ," assigned in the petition, are without merit.

(1) As to the first assigned reason, the decision of the Circuit Court of Appeals in the instant case, *Helvering, Commissioner, v. St. Louis Union Trust Co.*, 75 F. (2d) 416 (C. C. A. 8), is not in conflict with the decision in *Commissioner v. Schwarz*, 74 F. (2d) 714 (C. C. A. 2), (a) because the facts are substantially different, and (b) because the opinion in each case makes clear the distinction in fact between the two classes of cases and shows that, in respect of the legal doctrines applicable, the two courts are in harmony, not in conflict.

(a) The substantial dissimilarity in fact is clear. In the *Schwarz* case the settlor had conveyed property in trust to pay out of the net annual income a stated annuity to his sister Anna, during her life, and to pay the balance of the net annual income to himself, if living, and if not living, then over to others. In respect of the corpus, the instrument provided that, at the death of his sister Anna,

> "The trustee shall pay, transfer and deliver the principal of the said trust fund * * * to the donor, if then living, and if not then living, in equal shares, per stirpes, to his descendants then living, and if neither he nor any descendants of his be then living, in equal shares to such of his brothers and sisters as shall be then living,"

and he named his brothers and sisters.

The settlor reserved the right to transfer additional

property to the trust at any time, also the right to withdraw any of the trust property before April 1, 1927, and to receive the property so withdrawn as his absolute property, free and discharged from the trust. He also reserved the right to amend the trust at any time before April 1, 1927, and the right to revoke and terminate the trust before that date, provided such amendments of revocation and termination be made in writing, signed by the donor or his nominees duly authorized.

The settlor died January 1, 1931, without having revoked or amended the trust. His sister Anna survived him. His executors, in filing their estate tax return, failed to include as a part of decedent's estate the value of decedent's interest in the property held in trust. The Commissioner determined a deficiency in federal estate tax resulting from including in the gross estate the value of decedent's remainder interest in the property thus held in trust.

It will be noted from these facts: That the settlor reserved to himself not only the beneficial ownership (subject to the specific annuity to his sister Anna for her life), but also the remainder in the corpus after her life estate; and that in the event of his death during his sister's life estate, then by his death said remainder would pass to his descendants, etc.

Therefore, it necessarily followed that his death was the event intended by the instrument which effected a transmission of this reserved remainder from the settlor to his living descendants.

That the Circuit Court of Appeals so held appears clearly from the following portions of its opinion (*Commissioner v. Schwarz*, 74 F. [2d] 712, at 713-714):

> "Here the decedent transferred property in trust, a fixed amount of the income from which was to be paid

annually to his sister during her life. Up to April 1, 1927, the trust could have been revoked, but was not revoked nor amended by him at any time before his death. By the terms of the trust instrument he reserved to himself a remainder over after termination of the life estate, and if his death occurred prior to the termination of the life estate, the decedent's remainder interest went to his descendants. Since he died prior to the termination of the life estate, it was proper to include in his gross estate, subject to the federal estate tax, the value of the remainder interest which passed at his death to his descendants. Klein v. United States, 283 U. S. 231, 51 S. Ct. 398, 75 L. Ed. 996; Com'r v. City Bank Farmers' Trust Co. (C. C. A. 2), 74 F. (2d) 242, decided Dec. 17, 1934; Union Trust Co. v. United States (Ct. Cl.), 54 F. (2d) 152; Sargent v. White, 50 F. (2d) 410 (C. C. A. 1).

"The death of this grantor was the indispensable and intended event which effected a transmission of a remainder interest from the dead to the living (Klein v. United States, supra), and the grant of the remainder interest in the trust fund was necessarily 'intended to take effect in possession or enjoyment at or after' decedent's death within the meaning of the statute, Section 302 (c), 26 U. S. C. A., § 1094 (c). Thus the value of the remainder interest in the trust fund should be included in the gross estate. The life estate should be valued and deducted from the full amount of the trust corpus and the remainder taxed. Lit v. Commissioner (C. C. A.), 72 F. (2d) 551."

In the instant case the grantor did not reserve a remainder interest. He kept merely a possibility of a reverter. When he died, his daughter surviving, he had no interest whatever which passed to others as the result of his death. He had theretofore by his trust indenture parted irrevocably with all interest in the trust estate during her life.

That this fundamental distinction in the facts constituted the reason for the decision of the Circuit Court of Appeals in the instant case appears from the following excerpt from the opinion (*Helvering, Commissioner, v. St. Louis Union Trust Co.*, 75 F. [2d] 416, at 418):

> "The distinction between the Klein case and this case, as we see it, is that in the former the legal title was retained by the grantor and passed to the grantee with the grantor's death, while here the grantor parted with the title and all beneficial interest in the property and retained no right with respect thereto that would pass to anyone as the result of his death. In the Klein case death was the generating source of title, while in this case the trust instrument was the source of title, and death merely destroyed a possibility that the trust property might revert to the grantor."

(b) Moreover, in both the instant case and the *Schwarz* case the opinions of the Circuit Courts of Appeals stress the same distinction above noted and thereby clearly avoid all conflict in doctrine as between said courts.

This appears from a comparison of the above excerpts from the opinion in the instant case with the following from the opinion in the *Schwarz* case (74 F. [2d] 712, at 713; italics ours):

> "This case is to be distinguished from the class of cases where property is transferred in trust • • • *where no remainder is reserved in the grantor.* In such cases *the death of the grantor is not the event which effects the transfer of the remainder interest in the property held in trust.*"

And, at page 714:

> "Cases such as Reinecke v. Northern Trust Co., 278 U. S. 339, 49 S. Ct. 123, 73 L. Ed. 410, 66 A. L. R. 397;

May v. Heiner, 281 U. S. 238, 50 S. Ct. 286, 74 L. Ed. 826, 67 A. L. R. 1244; McCormick v. Burnet, 283 U. S. 784, 51 S. Ct. 343, 75 L. Ed. 1413, and Commissioner v. Wallace (C. C. A.), 71 F. (2d) 1002, *are distinguishable*. There the remainders were in form or substance vested to persons other than the grantors and not, as here, contingent on the time of his death. In Helvering v. Duke, 290 U. S. 591, 54 S. Ct. 95, 78 L. Ed. 521, the trust instrument provided for the creation of a trust for the benefit of the grantor's daughter, her children and their descendants during her life, and for a further period of twenty-one years, at which time the corpus was to be distributed to the children and their descendants. In the event that the beneficiary died prior to the death of the grantor, or in the event that she died subsequent to his death and left no children or descendants of children surviving, the corpus would revert to the grantor or her estate. It was held that *this mere possibility of reverter did not have the effect of reserving* to the grantor any rights or benefits which passed at or after his death. In the instant case the trust was created for the purpose of providing a fixed annual income to a beneficiary for life. The grantor clearly *parted with no larger interest* in the trust corpus. *His death effected the transmission* of his remainder interest to his heirs. Under authoritative decisions, that remainder constituted a part of his taxable gross estate."

(2) The second suggested reason for granting the writ, viz., that "the existing situation is in need of clarification," is not pertinent to the decision in the instant case.

The petition rests the contention (p. 7) chiefly upon the decisions in the instant case and in the *Schwarz* case.

That these two decisions do not support the contention appears from their respective facts and doctrines as shown above.

Nor do the other cited decisions support the suggestion that the instant case should be used to clarify the question of law herein decided. The doctrine applicable to the instant case, and in accord with which it was decided by the Circuit Court of Appeals for the Eighth Circuit, has already been clarified by this Court.

In *May v. Heiner*, 281 U. S. 238, the decedent, Pauline May, had on October 1, 1917, by trust conveyance, transferred securities in trust, to pay the net income to her husband during his life, and, after his death, to her during her life, and after her death the estate was to be distributed equally among her children. It does not appear from the opinion whether her husband survived her, but this fact was held to be of no importance.

The Government contended (281 U. S., at 243) that, *because of her reserved life estate,* if she survived her husband, the transfer of the principal could not take effect *until her death,* and that therefore the estate was taxable. The Court held that the conveyance was not one to take effect in possession or enjoyment at or after her death, saying (281 U. S., p. 243) (italics ours):

> "The transfer of October 1, 1917, was not made in contemplation of death within the legal significance of those w rds. It was not testamentary in character and was beyond recall by the decedent. At the death of Mrs. May *no interest* in the property held under the trust deed passed from her to the living; title thereto had been definitely fixed by the trust deed. The *interest therein which she possessed immediately prior to her death was obliterated by that event.*"

The rule thus established has been followed by the Circuit Courts of Appeals, including the Court which decided the instant case.

In *McCormick v. Burnet, Commissioner*, 283 U. S. 784, the Court adhered to the rule established in *May v. Heiner*. The grantor, Nettie McCormick, had by trust conveyance transferred securities in trust, with a provision that should she survive the other named beneficiaries, or in case of an earlier termination of the trust, the trust estate should revert to her if then living.

(The analogy to the facts in the instant case is close.)

The case originated before the Board of Tax Appeals as *Cyrus H. McCormick et al. v. Commissioner*, 13 B. T. A. 423, where the principal question decided was whether the trust estate thus settled by the decedent was "intended to take effect in possession and enjoyment at or after death."

One of the arguments for the Commissioner in support of his contention that the trust estate was subject to the estate tax was based on:

> "The provision that should the decedent survive the beneficiary, the trust would terminate, and she would take the trust property" (13 B. T. A., at 437, referring to Article Third of the McCormick trust settlement as set out in 13 B. T. A., at pages 427-428).

The Board of Tax Appeals decided against this contention, saying (13 B. T. A., at 438):

> "We are confirmed in this conclusion when we consider that Mrs. McCormick completely divested herself of legal title and beneficial ownership five years prior to her death, *subject only to certain contingencies which, in fact, never operated.*"

On appeal from this decision the Circuit Court of Appeals for the Seventh Circuit (*Commissioner v. McCormick*, 43 F. [2d] 277, at 279) held that said provision in

the trust conveyance did tend to show an intent to create a trust to take effect in possession or enjoyment at or after the death of the grantor.

On writ of certiorari this Court, in a per curiam opinion (*McCormick v. Burnet, Com'r*, 283 U. S. 784), reversed the judgment of the Circuit Court of Appeals, saying (p. 784) (italics ours):

> "The question in this case is that of the construction of Section 402 (c) of the Revenue Act of 1921, Chap. 136, 42 Stat. at L. 227, 278, a provision similar to that of Section 402 (c) of the Revenue Act of 1918, Chap. 18, 40 Stat. at L. 1057, 1097, which has already been construed by this Court; and, in this view, there being no question of the constitutional authority of the Congress to impose prospectively a tax with respect to transfers or trusts of the sort here involved, the judgment of the United States Circuit Court of Appeals for the Seventh Circuit is reversed *upon the authority of May v. Heiner*, 281 U. S. 238, 74 L. Ed. 826, 67 A. L. R. 1244, 50 S. Ct. 286."

While it is true, as stated in the petition herein (p. 8), that the affirmance in *Helvering v. Duke*, 290 U. S. 591, having been by an equally divided court, may not be regarded as an authoritative decision by this Court, the case should be noted as showing that another Circuit Court of Appeals (of the Third Circuit) held in harmony with the above decisions of this Court in *May v. Heiner* and *McCormick v. Burnet, Com'r*, on facts in close analogy to those in the instant case.

In *Helvering v. Duke* the settlor, Duke, had made an absolute settlement of securities in trust for the benefit of his daughter and her descendants, with a provision that if she died during his lifetime the trust estate should revert to him in absolute title.

The daughter survived the settlor, so the contingency, upon the happening of which rested the possibility of a reversion, did not occur.

The case originated in *Duke v. Commissioner*, 23 B. T. A. 1104, and was there decided on the authority of the decisions in *McCormick v. Commissioner*, 283 U. S. 784, and of *May v. Heiner*, 281 U. S. 238, against the taxability of the mere possibility of a reverter which never became an actuality. This decision of the Board of Tax Appeals was affirmed in *Commissioner v. Duke*, 62 F. (2d) 1057, at 1058 (C. C. A. 3), upon a memorandum opinion which merely approved the opinion of the Board.

The decision in *Commissioner v. Wallace*, 71 F. (2d) 1002 (C. C. A. 2), clearly affords no support for the contention that confusion exists among the Circuit Courts of Appeals on the point involved and decided in the instant case.

In the *Wallace* case the settlor had transferred securities in trust, reserving the right to receive the net income during her own life. At her death the trust estate was to be distributed to the daughter of settlor if the daughter then survived. If the daughter should die first, the estate was to revert to the settlor. The daughter did not die first.

The Board of Tax Appeals held (*Wallace v. Commissioner*, 27 B. T. A. 902, at 913), that the death of settlor was not the generating source of any accession to the property rights of the surviving daughter; therefore, the "mere possibility of reversion" (27 B. T. A., at 910), which never became an actuality, did not afford the basis of a tax.

The Circuit Court of Appeals for the Second Circuit summarily dismissed the appeal of the Commissioner (on

June 4, 1934) with the following per curiam opinion (71 F. [2d] 1002):

> "Affirmed on the authority of *McCormick v. Burnet, Commissioner*, 283 U. S. 784, 51 S. Ct. 343, 75 L. Ed. 1413, and *May v. Heiner*, 281 U. S. 238, 50 S. Ct. 286, 74 L. Ed. 826, 67 A. L. R. 1244."

And on October 15, 1934, this Court denied the Commissioner a writ of certiorari (*Helvering v. Wallace*, 293 U. S. 600).

It is true, as stated in the petition herein (p. 9), that in the *Wallace* case the Board of Tax Appeals held that, under the pertinent law of New York State, the daughters, by the trust instrument, took a vested remainder, and in that respect the facts differ from those in the instant case, but the fact remains that both the Board of Tax Appeals and the Circuit Court of Appeals considered and decided the point that the settlor's mere possibility of a reverter, which did not occur, afforded no basis for a tax.

It is not correct to say (Petition, p. 9) that in the instant case a remainder was given in the first instance to the grantor. On the contrary, a complete and irrevocable title was given in the first instance to the daughter during her life, subject only to the bare possibility of a reverter in case she predeceased the grantor pending the trust.

From the cases above reviewed it appears that the Circuit Courts of Appeals of the Second, Third and Eighth Circuits have followed the rule in *May v. Heiner* (supra), and that while the Court in the Seventh Circuit, in the McCormick case (43 F. [2d] 277), did not follow it, the decision *contra* was reversed (*McCormick v. Burnet, Com'r*, 283 U. S. 784).

It is respectfully submitted that the cases above reviewed show that the decision sought to be reviewed in

the instant case is in accord with the established doctrine of this Court, and that no confusion in doctrine now exists upon the point decided sufficient to invite a reconsideration here of the same point which the Court refused to review in the *Wallace* case.

The case of *Klein v. U. S.*, 283 U. S. 231, cited in support of the petition herein (p. 7), is clearly to be distinguished from the instant case and is, therefore, not in point here.

In the *Klein* case the first habendum clause of Klein's deed conveyed to his wife a life estate which vested immediately (283 U. S., at 232). The second clause dealt with the reversion in fee, which the grantor expressly *retained*, and, as the Court said (283 U. S., at 233-234; italics ours):

> "Whether that *ever did become vested in the grantee depended upon the condition precedent* that *the death of the grantor happened before that of the grantee.*"

Accordingly it was held that *the death of the grantor* was "the indispensable and intended event which brought the larger estate *into being* for the grantee *and effected its transmission* from the dead to the living."

In the instant case the situation is substantially different. Here the grantor did not retain a remainder, but parted with it, retaining only a contingent possibility of reverter. Here it is not the death of the grantor, but the death of his daughter, or the earlier termination of the trust, which determines the vesting of the reversion sought to be taxed. Neither of these contingencies, upon the happening of either of which the reversion would take effect, *had any relation to the death of the grantor*. And neither happened. The trust still exists, and his daughter survived the grantor.

Consequently his death did not effect the transmission of any interest in the property "from the dead to the living." It merely destroyed the possibility that when either contingency should happen the estate would revert to the grantor.

It may be of interest to note here that when decedent (Orthwein) died, the Government interpreted Section 302 (c) of the Revenue Act of 1924 (involved in the instant case), as meaning that *contingent* interests, even when they were remainders, were not required by the act to be included in the gross estate for the purpose of the estate tax.

This appears from Article 11 of Regulations 68 (quoted above), to the effect that contingent remainders should not be included "where the contingency does not happen in the lifetime of decedent, and the interest consequently lapses at his death."

Under the Revenue Act of 1926, Article 11 of Regulations 70, was to the same effect.

To the extent that "Regulations" are to be considered part of the law, the decision in the instant case was in accord with the act as so construed by the Government.

(3) The third reason suggested in the petition for a writ (p. 11) is dual in substance:

(a) That there is *now* a conflict of decisions in the Circuit Courts of Appeals.

This has been answered above.

(b) That in the *Wallace* case the Government sought to impose the tax upon the whole value of the trust property, whereas the tax involved in the instant case is sought to be imposed only upon the value of the remainder.

It is respectfully submitted that this distinction is wholly

irrelevant to the controlling question considered and decided in the two cases.

II.

Conclusion.

In conclusion, it is respectfully submitted that the reasons advanced in the petition herein lack the merit required by Rule 38 and that, therefore, the petition should be denied.

Respectfully submitted,

DANIEL N. KIRBY,
Attorney for Respondents.

May, 1935.

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CHARLES ELMORE

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1935.

No. 25.

GUY T. HELVERING, Commissioner of Internal Revenue,
Petitioner,

vs.

ST. LOUIS UNION TRUST COMPANY, as Successor Trustee to LIBERTY CENTRAL TRUST COMPANY, as Sole Residuary Legatee and Distributee of the American Estate of WILLIAM J. ORTHWEIN, Deceased, et al.,
Respondents.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

BRIEF FOR RESPONDENT.

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On Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

BRIEF FOR RESPONDENT.

OPINIONS BELOW.

The findings of fact and opinion of the Board of Tax Appeals (R., p. 26) are reported in St. Louis Union Trust Company v. Commissioner, 28 B. T. A. 107. The opinion of the Circuit Court of Appeals (R., p. 59) is reported in Helvering v. St. Louis Union Trust Company, 75 Fed. (2d) 416.

JURISDICTION.

The judgment of the Circuit Court of Appeals was entered January 17, 1935 (R., p. 62). The petition for writ of certiorari was filed April 17, 1935, and granted May 20, 1935 (R., p. 64).

STATEMENT OF THE CASE.

THE QUESTION PRESENTED.

The question presented by the case is as follows:

Where a grantor in 1920 transferred property inter vivos upon trust to pay the income therefrom to a daughter, for and during her life, with provision that, upon the death of the daughter, the trust should terminate and the corpus should be reconveyed to the grantor, if he should then be living, or, if he should not then be living, such corpus should be distributed to specified beneficiaries, is the transfer one "intended to take effect in possession or enjoyment at or after his death," under Section 302 (c), Revenue Act of 1924, so as to require the inclusion of the value of the property transferred, in the gross estate of the grantor upon his death in 1925, prior to that of his daughter?

THE FACTS.

The statement of facts contained on pages 2-3 of petitioner's brief is substantially correct. Attention is, however, called to the omission of mention of a limitation contained in the indenture of January 1, 1920, between William J. Orthwein and Mercantile Trust Company, viz.: That indenture provided substantially that, in the event

neither the grantor, nor his wife, nor any child or children of the grantor's daughter, should survive at the death of the grantor's daughter, then, upon her death, the trustee should make distribution of the trust estate in accordance with appointment made by the grantor's daughter by her will. The further provision (to which petitioner referred at page 4 of his brief), for disposal of the trust estate to the next of kin of the grantor was applicable only in the event of a default in the exercise by the daughter of her power of appointment (R., p. 53).

The case was tried upon a stipulation of facts (R., pp. 39-46) to which are appended as exhibits the will of William J. Orthwein and the trust indenture of January 1, 1920, the provisions of which form the basis of this controversy.

SUMMARY OF ARGUMENT.

Respondent contends:

1. That in, and by his indenture in trust of January 1, 1920, the decedent, William J. Orthwein, made a complete transfer of the trust property, reserving no estate or interest in the trust property, other than a right to a revestiture upon the contingency of his surviving his daughter, the life beneficiary of the trust—a contingency which never in fact occurred.

2. That, upon his death, no "transmission" of any estate or interest in the trust property took place, and such death was not the "generating source" of the enlargement of the estates of any of the beneficiaries of the trust, but resulted merely in the obliteration of the possibility of Orthwein's revestiture.

3. That the source of the title of the trust beneficiaries was not the death of Mr. Orthwein, but was the trust indenture of January 1, 1920.

4. That the transfer was, by reason of the foregoing, not one intended to take effect in possession or enjoyment at the death of Mr. Orthwein.

It is further respectfully contended that the controlling decisions of this Court are:

McCormick v. Burnet, 283 U. S. 784, and
May v. Heiner, 281 U. S. 238,

and not, as petitioner contends:

Klein v. United States, 283 U. S. 231,

because, in the Klein case, the grantor had reserved, in his conveyance, an estate in the property conveyed, which passed upon his death to another, whereas in the instant case, as in the McCormick case, the grantor retained only a contingent right to revestiture and his death effected no transmission from the dead to the living, or enlargement of the estates of other beneficiaries, but merely an obliteration of the possibility of revestiture.

ARGUMENT.

THE TRUST INDENTURE.

By his indenture of trust made the 1st day of January, 1920 (R., p. 48), William J. Orthwein conveyed, assigned, transferred and delivered to Mercantile Trust Company, as trustee, certain securities of the par value of $119,000, to hold, manage and dispose of the same as an active trust estate, subject to trusts, duties, powers, conditions and limitations set forth in the instrument. In the instrument the trustee was directed to pay the net income of the trust estate to the grantor's daughter, Mrs. Alma Feraldo, or to expend such income for her support, maintenance and benefit, for and during her life. The trust instrument directed that, upon the death of the grantor's daughter, "if the grantor be still living," the trustee should forthwith transfer, pay and deliver the entire trust estate to the grantor to be his absolutely; but that, if the grantor should not then be living, the trustee should continue to hold the trust estate for the benefit of the grantor's invalid wife, if she should then be living; and that, upon the death of the grantor's wife, if she survive the grantor, or upon the death of the grantor's daughter, in case the daughter was survived by a child or children but not by the grantor or the wife of grantor, then the trustee should continue to hold the trust estate for the equal benefit of the daughter's children, during their minority, and, upon their majority, should distribute the corpus of the trust estate to them or the survivors of them. It was further provided that, upon the contingency of the daughter's death subsequent to that of the grantor and his wife, and without leaving children her surviving, the daughter should have power of appointment of the trust estate by

will, and that, in default of such appointment, the estate should be distributed among the next of kin of the grantor.

The grantor retained for himself no power of revocation or alteration of the trust. The only power to terminate the trust during the life of the grantor rested in the trustee.

According to the terms of the trust instrument, the only possibility of the grantor ever reacquiring an interest in the trust property depended upon the happening of certain contingencies, which in fact never happened. viz.:

1. The termination of the trust by the trustee, during the grantor's life, or

2. The death of his daughter, the life tenant, before his death, plus the then existence of the trust.

Grantor's daughter survived him and the trust was still in existence at the date of his death (R., p. 44), so that neither of the contingencies, upon which he might have reacquired the property, ever in fact happened. At the death of the grantor, his daughter being alive, decedent had "no further individual or beneficial interest" in the trust estate, which passed or could have passed upon his death.

THE CONTENTIONS OF PETITIONER.

The contention of the petitioner is that, by reason of the fact that the grantor reserved the right to be revested with the property, *if he should be living at the time of his daughter's death*, the transfer was one intended to take effect in possession or enjoyment on the grantor's death, within the meaning of Section 302 (c) of the Revenue Acts of 1924 (Br., p. 6). In so contending, the petitioner asserts that the death of the decedent was the "generating source" of

"important and definite accessions to the property rights" of the beneficiaries who were to take in the event *that the daughter survived the grantor.* "Plainly," says the petitioner, "it enlarged their defeasible interest in the property into an indefeasible one."

THE CONTENTIONS OF RESPONDENTS.

It is respectfully submitted that the true situation is the reverse of that posed by the petitioner.

We agree with the petitioner that the dominant purpose of Section 302 (c) of the Revenue Act of 1924, subjecting to tax transfers "intended to take effect in possession or enjoyment at or after" death, was to reach the substitutes for testamentary dispositions. The converse is also true, that, to fall within the clause, a transfer must have testamentary character (*Nichols v. Coolidge*, 274 U. S. 531, 542).

Tested from the standpoint of testamentary character, the facts in the instant case defeat the petitioner's contentions. The divestiture by Mr. Orthwein of his interest in the trust property was complete and irrevocable. At no time during his lifetime, nor even at the moment of his death, did he have such control over the trust property as would have enabled him to revest himself with it or to alter the disposition. The contingencies never occurred upon which such revestiture could take place. He was powerless at any time to change the trust instrument or to revoke or modify the action which he had taken in 1920, when he created the trust. The trust was indefeasible from the moment of its creation, free from the continuing grasp which "testamentary" character implies.

The statutory clause, "to take effect in possession or enjoyment at or after his death," is meaningless when

attempted to be applied to the transfer in question. No possession or enjoyment passed from the grantor at his death, and no possession or enjoyment vested, upon his death, in another. The life estate of his daughter continued uninterruptedly as before, and the contingent remainders remained contingent. As was said by this Court in *Reinecke v. Northern Trust Company*, 278 U. S. 339, the phrase was not intended to include transfers other "than those passing from the possession, enjoyment or control of the donor at his death, and so taxable as transfers at death, under section 401."

The invocation by petitioner of the phrases, "generating sources" or "important and definite accessions to the property rights" of the beneficiaries, is an importation from the law as announced by this Court in cases involving revocable trusts (*Chase National Bank v. United States*, 278 U. S. 327), involving estates by entirety, where the joint estate of the spouses becomes, by virtue of the death of the one, the "generating source" of the other's indefeasible title (*Tyler v. United States*, 281 U. S. 497); and involving other situations where estates came into being as a result of the settlor's death (*Klein v. United States*, 283 U. S. 231):

The phrases descriptive of the doctrine of those other cases have, however, no application to the situation before the Court where Mr. Orthwein's death gave rise to no vestiture of either title or possession in the beneficiaries, but merely resulted in the obliteration of his own theretofore possible right of revestiture. Rather should it be said that the death of the daughter prior to that of the grantor might have been the "generating source" of a destruction of the trust and a revestiture in the grantor. The "generating source" of the titles of the beneficiaries of the trust indenture was the indenture itself.

To sustain a tax in respect to a transfer under the provisions of Section 302 (c) of the Revenue Act of 1924 as one "to take effect in possession or enjoyment" at or after death, it is submitted that there must be a passing of property rights at the death of the grantor, as distinguished from the obliteration of a contingency, in accordance with the terms of a trust instrument which had created the rights and defined the contingencies years before the death occurred. There must be a transfer as a result of death, and not a mere elimination of a contingency.

As the Circuit Court of Appeals in the instant case (Helvering, Commissioner, v. St. Louis Union Trust Company, 75 Fed. [2d] 416, at 418) said:

> "In no proper sense was there an enlargement of the interests of the beneficiaries of the trust resulting from the death of the decedent. That event merely changed the possibility that the property would revert to him into an impossibility. * * * The grantor parted with the title and all beneficial interest in the property, and retained no right with respect thereto that would pass to anyone as the result of his death. * * * The trust instrument was the source of the title, and death merely destroyed the possibility that the trust estate might revert to the grantor."

INCIDENTAL CONTENTIONS OF PETITIONER.

Before examining the authorities in relation to the respective principal contentions of petitioner and respondent, it is desirable to comment upon two incidental contentions made by petitioner, viz.:

(a) While earnestly contending that technical differences, under real property law, between interests conveyed, are not controlling in the interpretation of the

Internal Revenue Law (Brief, p. 15), the petitioner attempts (Brief, p. 11) to argue the case from the standpoint of Missouri property law, by contending that the decedent "created in himself a *vested remainder* subject to divestment by his death," thus "multiplying words in respect of the various niceties of the art of conveyancing or the law of contingent and vested remainders." In support of the contention that the grantor created in himself a "vested remainder," petitioner cites:

Tindall v. Tindall, 167 Mo. 218, 225, where a conveyance to a life tenant (who was childless at the time of the conveyance), and then to the issue of her body forever, was held to create contingent interests in the issue until such issue were born.

Heady v. Hollman, 251 Mo. 632, 638, where a limitation over to heirs was, in view of the context, construed to designate the children of a named living person as the remaindermen, and where such children as a class were held to take vested remainders subject to open and let in afterborn children of the named person.

Green v. Irvin, 309 Mo. 302, 311, where it was held that a devise to a daughter for life, and after her death to her heirs, created a contingent remainder in her heirs.

None of these cases held that a limitation over to a person, upon the contingency of his surviving another, created a vested interest. On the contrary, the Supreme Court of Missouri, in *Dwyer v. St. Louis Union Trust Company*, 286 Mo. 481, 487, has directly held, in a case involving a limitation over to named persons, if "living at the time of her death," that the limitation constituted the persons contingent remaindermen.

Such recourse to local property law merely serves to

emphasize the fact that Mr. Orthwein's interest in the trust estate was purely contingent upon his survivorship. Upon his death prior to that of the life beneficiary, there was no interest of which he could, by further act of his, dispose—there was nothing over which he had testamentary control—there was nothing which passed from him to the living. Whether viewed from the standpoint of the niceties of the property law, or from the standpoint of the substantialities of transmission, which this Court treats as controlling in its interpretation of the Revenue Act, there was, at the death of Mr. Orthwein, not a shifting of interests, but a destruction of the possibility of interest.

(b) Some emphasis is placed by petitioner upon the fact that the tax involved is measured by the supposed "value of the decedent's remainder interest, subject to the daughter's life estate," rather than by the value of the trust property. The supposition of such a value, at the moment of the death which destroyed the possibility of any value coming to Mr. Orthwein, is itself a sophism. Such emphasis, however, tends to divert consideration from the essential question as to whether or not there was a transfer intended to take effect in possession or enjoyment at or after death. If no such transfer was made, there is no subject matter for taxation, and the measure of the tax is immaterial.

THE CONTROLLING AUTHORITIES.

The contentions of the petitioner are contrary to the decided cases of this Court and of the Circuit Courts of Appeals.

The case of *McCormick et al., Executors, v. Burnet, Commissioner of Internal Revenue*, 283 U. S. 784, came

before this Court on writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit. It involved a trust settlement substantially like that in the instant case, to the effect that the trust estate should terminate upon the death of the last survivor of the three children of the grantor (Nettie McCormick), and might be terminated by the grantor with the consent of one or more of her three children, and that, upon such termination, the corpus of the trust estate should be paid and delivered to the grantor, *if she should then be living,* otherwise to the children, etc. The case differed from the case at bar in that it involved the additional reservation by the grantor of income from the trust estate.

The case originated before the Board of Tax Appeals as *McCormick et al., Executors, v. Commissioner of Internal Revenue,* 13 B. T. A. 423, where one of the principal questions decided was whether the transfer made by the decedent was "intended to take effect in possession or enjoyment at or after the death" of the grantor, so as to be taxable under the provisions of Section 402 (c) of the Revenue Act of 1921. One of the arguments of the Commissioner, in support of his contention that the value of the trust estate should be included in the gross estate of the grantor for estate tax purposes, was based upon:

> "the provision that, should the decedent survive the beneficiaries, the trust would terminate, and she would take the trust property" (13 B. T. A., at page 437, referring to Article Third of the McCormick trust settlement as set out in 13 B. T. A., pages 427-428).

The Board of Tax Appeals decided against this contention by saying (13 B. T. A. 438):

> "We are confirmed in this conclusion when we consider that Mrs. McCormick completely divested her-

self of legal title and beneficial ownership five years prior to her death, subject only to certain restrictions and contingencies which in fact never operated."

On appeal from the decision of the Board of Tax Appeals, the Circuit Court of Appeals for the Seventh Circuit (*Burnet, Commissioner, v. McCormick et al., Executors,* 43 Fed. [2d] 277, at 279) held that said provision in the trust conveyance tended to show an intent to create a trust to take effect in possession or enjoyment at or after the death of the grantor, and therefore the value of the trust estate had been properly included in the gross estate of the grantor.

On writ of certiorari this Court, in a per curiam opinion (*McCormick et al., Executors, v. Burnet, Commissioner,* 283 U. S. 784), reversed the decision of the Circuit Court of Appeals, saying:

> "The question in this case is that of the construction of Sec. 402 (c) of the Revenue Act of 1921, Chap. 136, 42 Stat. at L. 227, 278, a provision similar to that of Sec. 402 (c) of the Revenue Act of 1918, Chap. 18, 40 Stat. at L. 1057, 1097, which has already been construed by this Court; and, in this view, there being no question of the constitutional authority of the Congress to impose prospectively a tax with respect to transfers or trusts of the sort here involved, the judgment of the United States Circuit Court of Appeals for the Seventh Circuit is reversed, upon the authority of May v. Heiner, 281 U. S. 238, 74 L. ed. 826, 67 A. L. R. 1244, 50 S. Ct. 286."

This Court, in the McCormick case, therefore gave application, in a case where the grantor reserved a right to retake trust property upon a contingency of survivorship which never occurred, of the same doctrine which it had

theretofore applied in May v. Heiner, to a case involving a reservation by a grantor of a life estate in trust property. In both cases the grantor had made a complete divestiture of his title to the trust-res, and his death resulted merely in obliteration of any reserved rights.

May v. Heiner, 281 U. S. 238, involved a transfer by a decedent, Pauline May, of certain property to her husband and others, as trustees, with provision that the income of the trust estate be paid to grantor's husband during his lifetime, after his death to the grantor during her lifetime, and that, after her decease, the trust property should be distributed equally among her four children, their distributees or appointees. The Commissioner, after the death of the grantor, demanded additional estate taxes, reckoned upon the property held under the trust instrument, on the theory that the transfer was one intended to take effect in possession or enjoyment at or after the grantor's death within the meaning of Section 401 of the Revenue Act of 1918. Suit was brought by the executors to recover the tax paid pursuant to the demand. This Court held that, at the death of the grantor, no interest in the trust property passed so as to subject the value thereof to estate taxes. The Court said (page 243):

> "The transfer of October 1, 1917, was not made in contemplation of death within the legal significance of those words. It was not testamentary in character and was beyond recall by the decedent. At the death of Mrs. May no interest in the property held under the trust deed passed from her to the living; title thereto had been definitely fixed by the trust deed. The interest therein which she possessed immediately prior to her death was obliterated by that event."

The rationale of the opinion in *May v. Heiner*, as already applied in *McCormick v. Burnet* (which was decided upon the authority of *May v. Heiner* and presents precisely the same situation as is presented by the case at bar), applies to the case at bar, viz.:

(a) The disposition was not "testamentary in character," for Mr. Orthwein was powerless, during his lifetime, or at his death by will, to deal with trust property.

(b) The disposition was "beyond recall by the dedecedent."

(c) At the death of Mr. Orthwein "no interest in the property held under the trust deed passed" from him "to the living," but a mere contingency, which might have defeated the contingent remainders of Mrs. Feraldo's children, was obliterated.

(d) Title to the trust property "had been definitely fixed by the trust deed." No act on the part of Mr. Orthwein was needed to complete the dispositon of the trust property, and no act of his could alter or revoke it.

(e) The interest in the trust property, which the grantor possessed immediately prior to his death, "was obliterated by that event." His interest had been a right to retake the property contingent upon his survivorship, and that contingency was eliminated.

The law, as authoritatively determined by *McCormick v. Burnet, Commissioner*, 283 U. S. 784, in extension of the doctrine of *May v. Heiner*, 281 U. S. 238, has been augmented by the decisions in two other cases which have come before this Court, namely, *Helvering v. Duke*, 290 U. S. 591, and *Helvering v. Wallace*, 293 U. S. 600. While these cases did not involve decisive determinations by this

Court of the question in the case at bar, since in the Duke case this Court affirmed the decision of the Circuit Court of Appeals for the Third Circuit by an equally divided court, and in the Wallace case this Court merely denied a petition for writ of certiorari, yet the decisions of the courts below, founded as they are on the authority of *McCormick v. Burnet, Commissioner,* are highly persuasive.

Helvering v. Duke, 290 U. S. 591. This case originated in *Duke v. Commissioner,* 23 B. T. A. 1104. It involved an absolute settlement by the settlor (Duke) of securities in trust for the benefit of his daughter and her descendants, with a provision that, if the daughter died during the settlor's lifetime, the trust estate should revert to him in absolute title. The daughter survived the settlor, so that the contingency upon the happening of which rested the possibility of reversion to the settlor did not occur. On appeal from a determination by the Commissioner that the value of the property transferred should be included in the gross estate of the settlor upon his death, for estate tax purposes, on the theory that the transfer was one intended to take effect in possession or enjoyment at or after the settlor's death, the Board of Tax Appeals sustained the contention of the taxpayers. The reasoning of the Board is so completely appropriate in the instant case that we quote from the opinion of the Board the following passage (23 B. T. A., at 1113, 1114):

> "The decedent made an absolute and unconditional gift of the property embraced in the two trusts. It is true the instruments provided that the property should revert to the decedent if the beneficiary predeceased him, but this was a mere possibility which did not in fact occur. Such possibility of reversion did not prevent the gift from being complete. In the

case of *Commissioner v. McCormick*, 43 Fed. (2d) 277, the Circuit Court of Appeals for the Seventh Circuit held that the fact that the settlor could revoke the trust if the beneficiary predeceased her was a factor to be considered in determining whether the trust was revocable or whether the gift was to take effect in enjoyment or possession at or after death, but the Supreme Court reversed that decision (McCormick v. Commissioner, 283 U. S. 784) on authority of *May v. Heiner*. In the case at bar the trust was not revocable. We passed on a similar question in the case of *Lillian M. Wheeler, Executrix, et al.*, 20 B. T. A. 695, and the Supreme Court in the case of *May v. Heiner*, 281 U. S. 238, decided the question adversely to the Commissioner.

"In this case the trust was actually created and took effect and the property passed to it before decedent's death. Nothing passed at or after his death. The fact that there was a bare possibility that the property which had already passed to the trust for the beneficiary might revert to the grantor during his lifetime, not by any act on his part, does not have the effect of reserving to the grantor any rights or benefits which passed at or after his death. He might have, by a bare possibility, reacquired the property during his life, but he did not. In the case of any gift by a man to his child or wife there is always a possibility that the donee may die, leaving the grantor sole heir, and thus a possibility of the donor reacquiring the property, but clearly this mere possibility is not sufficient to create or reserve in the donor property rights which pass to the donee only at or after the donor's death where the donee has had both the possession and enjoyment thereof during the donor's lifetime. This might equally be true whether the trust instrument contained any such provision or not. This contingency or possibility did not give the donor any rights of control over the property. He could

not have recalled the property to himself. When he died he was not seized or possessed of the property."

The decision of the Board was affirmed by the Circuit Court of Appeals of the Third Circuit in *Commissioner v. Duke*, 62 Fed. (2d) 1057, the Court saying at page 1058:

> "While the amount here involved is large, the decisive principle is simple. The facts and authorities have been so fully discussed by the Tax Board that we confine ourselves to affirming their decree."

This decision of the Circuit Court of Appeals was in turn affirmed by this Court by an equally divided court (*Helvering v. Duke*, 290 U. S. 591), the Chief Justice not sitting.

Helvering v. Wallace, 293 U. S. 600. This case originated in the Board of Tax Appeals as *Wallace v. Commissioner*, 27 B. T. A. 902. It involved a transfer of securities in trust, with reservation by the settlor of the right to receive the net income during her own life, and with provision that the trust estate was to be distributed to the daughter of the settlor on the latter's death, if the settlor's daughter then survived, but that, if the settlor's daughter should die first, the estate was to revert to the settlor. The daughter did not die first. The Board of Tax Appeals held (*Wallace v. Commissioner*, 27 B. T. A. 902, 913) that the death of the settlor was not the "generating source" of any accession to the property rights of the surviving daughter, and that therefore the "mere possibility of a reversion" (27 B. T. A., at 910), which never became an actuality, did not afford the basis of a tax.

The Circuit Court of Appeals for the Second Circuit, in *Commissioner v. Wallace*, 71 Fed. (2d) 1002, affirmed the decision of the Board on the authority of *McCormick v. Burnet*, and *May v. Heiner*, and this Court, in *Helvering*

v. Wallace, 293 U. S. 600, denied the Commissioner a writ of certiorari.

THE CASES RELIED ON BY PETITIONER.

The cases relied upon by petitioner are plainly distinguishable.

Chief reliance is placed by petitioner, in its contentions, on *Klein v. United States,* 283 U. S. 231. In that case this Court had before it a transfer made by one Solomon Klein, by deed whereby he conveyed real estate to his wife for and during the term of her natural life. The deed provided in its habendum clause that, if the wife should die prior to the decease of the grantor, she should, by virtue thereof,

> "take no greater or other estate in said lands, and the reversion in fee in and to the same shall in that event *remain vested* in the grantor, his heirs and assigns, such reversion being hereby reserved to said grantor and excepted from this conveyance."

It further provided that:

> "Upon condition, and in the event, that said grantee shall survive the said grantor, then and in that case only, the grantee shall, by virtue of this conveyance, take, have and hold said lands in fee simple unto the sole use of herself, her heirs, and assigns, forever."

This is the state of facts upon which this Court considered the question as to whether, the grantor having died prior to the death of the grantee, there should be included in his gross estate the value of the property transferred, and under which this Court held that:

> "The death of the grantor was the indispensable and intended event which brought the larger estate

into being for the grantee and effected its transmission from the dead to the living, thus satisfying the terms of the Taxing Act and justifying the tax imposed."

While it may be admitted that the technical rules of conveyancing are not determinative on the question of taxability of the transfer, yet there is such a substantial difference between the facts in the Klein case and the facts in the case at bar as to result in an entirely different conclusion as to whether or not "the death of the grantor was the indispensable and intended event which brought the larger estate into being."

In the Klein case the deed which evidenced the transfer made no grant of the absolute title to the property transferred. There remained in the grantor the reversionary estate. There vested in the grantee a life estate, plus a contingent remainder which only became vested upon the wife's surviving the husband. When the husband's death occurred there passed to her the entire fee-simple title and the right to enjoy the estate forever. Death was the "generating source" of the wife's indefeasible title, a title which, by the event, shifted from the dead to the living. Here was a disposition of testamentary character.

In the case at bar the grantor, by his conveyance, parted with the entire absolute title to all of the property subject to the indenture. There was no condition precedent to the vestiture. What he retained was not an estate in the property, but a right to repossess himself of it upon contingencies, viz.: The death of his daughter or the earlier termination of the trust—contingencies which never occurred. When death came to the grantor no change in title or in the right to possession or enjoyment took place. The life estate of Mrs. Feraldo continued as

before. The rights of her children, her legatees, or the heirs of Mr. Orthwein, remained, as before, contingent upon the occurrence of events other than his death. There was no "transmission" and no "enlargement" of the property rights of any beneficiary of which death could have been a generating source. The sole effect of the death was to eliminate the *possibility* of the property reverting to Mr. Orthwein and the elimination of one of the contingencies, the happening of which would have defeated the rights of the children, legatees or heirs.

In the Klein case death was the generative source of an accession; in the case at bar death was the obliterating agency of a mere possibility.

It is respectfully submitted that the Circuit Court of Appeals (*Helvering v. St. Louis Union Trust Company*, 75 Fed. [2d] 416) expressed the controlling distinction between the situation in Klein v. United States and the situation in the case at bar, which it decided upon the authority of McCormick v. Burnett, when it said, at page 418:

> "The distinction between the Klein case and this case, as we see it, is that, in the former the legal title was retained by the grantor and passed to the grantee with the grantor's death, while here the grantor parted with the title and all beneficial interest in the property, and retained no right with respect thereto which would pass to anyone as a result of his death. In the Klein case death was the 'generating source' of title, while in this case the trust instrument was the source of title, and death merely destroyed a possibility that the trust property might revert to the grantor."

Commissioner v. Schwarz, 74 Fed. (2d) 712, cited by the petitioner, sustains petitioner's contentions neither on

the basis of identity in facts nor on the the basis of doctrine. In that case the settlor had conveyed property in trust to pay out of the net annual income thereof a stated annuity to his sister Anna, during her life, and to pay the balance of the net income to himself, if living, and, if not living, over to others. In respect of the corpus, the instrument provided that at the death of his sister Anna,

> "the trustee shall pay, transfer and deliver the principal of the said trust fund * * * to the donor, if then living, and, if not then living, in equal shares, per stirpes, to his descendants, then living, and, if neither he nor any descendant of his be then living, in equal shares to such of his brothers and sisters as shall then be living";

and he named his brothers and sisters. The settlor died, leaving his sister Anna surviving.

From the standpoint of the facts, it is apparent that the situation was substantially different from that in the case at bar, in that the settlor, in the Schwarz case, reserved to himself, not only the balance of the income of the trust estate after payment of the annuity to his sister Anna, but also the right to receive the corpus of the trust estate after her life estate, with the limitation passing the remainder to his descendants, if he, the settlor, were not then living. Upon the death of the settlor prior to the death of the annuitant, the remainder interest might, in the words of the Court, have been considered as having "passed * * * to his descendants," so as to characterize the transfer as one intended to take effect in possession or enjoyment at or after the settlor's death. This is quite a different situation from that presented in the case at bar, where nothing *passed* at the settlor's death, and the mere possibility of a reversion to him was *obliterated*.

Nor does the case sustain petitioner's contention from a doctrinal standpoint, for the Court expressly recognized the doctrine of the McCormick and Duke cases, upon which we rely, to the effect that the "mere possibility of reverter did not have the effect of reserving to the grantor any rights or benefits which passed at or after his death" (74 Fed. [2d], at 714).

CONCLUSION.

It is respectfully contended that, upon the authority of *McCormick v. Burnet, Commissioner,* 283 U. S. 784, and *May v. Heiner,* 281 U. S. 238, the Circuit Court of Appeals in the instant case properly decided that the transfer made by Mr. Orthwein by the indenture of January 1, 1920, was not a transfer intended to take effect in possession or enjoyment at or after the grantor's death within the meaning of Section 302 (c) of the Revenue Act of 1924, because:

(a) The grantor parted, by his conveyance, with the absolute title and all beneficial interest in the property.

(b) He retained no control or power to dominate the trust property. There was no string tied to the conveyance, which he could draw at any time during his lifetime.

(c) The interest which he retained to repossess himself of the property was upon a contingency which never occurred.

(d) When death came to him the interests in the trust property remained the same as before. The life estate continued, and the contingent remainders continued to be contingent remainders. Death was the "generating source" of no accession to the beneficiaries and no trans-

mission whatsoever occurred. The "generating" source of all titles was the instrument itself.

(e) The only effect which the grantor's death had was to eliminate one of the contingencies which might have defeated the rights of the ultimate beneficiaries of the trust, viz.: The possibility of the grantor's surviving his daughter and becoming revested with the property.

(f) It was not the death of the grantor which, according to the terms of his trust instrument, might have effected a transmission, but the death of his daughter, which, had it occurred prior to his death, would have effected a transmission by causing a revestiture in the grantor.

A tax is sought to be imposed under the estate tax law, which, for the purpose, as petitioner states, of reaching substitutes for testamentary dispositions, includes among the transfers subject to tax, transfers intended to take effect in possession or enjoyment at or after death. But there is no substitute here for "testamentry disposition." Upon delivery of the trust instrument a complete alienation, without reservation of any interest which could "pass" or be "transmitted" at the settlor's death, took place. The taxation of such an alienation belongs in the realm of gift taxation and not inheritance taxation.

For the foregoing reasons, it is respectfully submitted, the judgment of the Circuit Court of Appeals should be affirmed.

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BRIEF AMICUS CURIAE

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No. 25.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1935.

GUY T. HELVERING, Commissioner of Internal Revenue,
Petitioner,

v.

ST. LOUIS UNION TRUST COMPANY, as Successor Trustee to Liberty Central Trust Company, as Sole Residuary Legatee and Distributee of the American Estate of William J. Orthwein, deceased, et al., *Respondents.*

On Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

BRIEF OF AMICUS CURIAE.

GARRET W. McENERNEY,
San Francisco,
Amicus Curiae.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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(2) Is a mere possibility of reverter possessed by a decedent at his death (whether it be one which survives his death and is descendible or one which is extinguished by his death) an item of ascertainable value to be included in his gross estate? 4

(a) It is the well-established common law rule that a possibility of reverter is not an *Interest* in property and that the owner of a defeasible estate to which a possibility of reverter is annexed, is universally treated as the owner of the *Entire* interest therein and the grantor as the owner of *NO* interest therein, until the event happens upon which the defeasance is worked and the reversion is accomplished 4

(b) A mere possibility of a reverter is not taxable because of the inherent practical difficulties in ever arriving at its value 6

(c) If proposition (a) above is not to be accepted as fully as stated, nevertheless the possibility of a reverter which depends upon a person with a shorter life's expectancy (as a father) surviving a person with a longer life's expectancy (as an adult daughter), which is the case here, is more imaginary than real having regard to the practical affairs of life 7

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No. 25.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1935.

GUY T. HELVERING, Commissioner of Internal Revenue,
Petitioner,

v.

ST. LOUIS UNION TRUST COMPANY, as Successor Trustee to Liberty Central Trust Company, as Sole Residuary Legatee and Distributee of the American Estate of William J. Orthwein, deceased, et al., *Respondents.*

On Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

BRIEF OF AMICUS CURIAE.

The petition of the Government for a writ of certiorari in this case states the "Question Presented" thus:

> "The decedent created an *inter-vivos* trust with directions (1) to pay the income therefrom for life to a daughter, upon whose death prior to that of the creator the trust should terminate and the corpus be delivered to the grantor; or (2) if the grantor predecease the daughter, for continuance of the trust with disposition of the income and corpus according to future contingencies.

"The question is whether the interest of the decedent therein should be included in his gross estate as a transfer 'intended to take effect in possession or enjoyment at or after his death', under Section 302(c), Revenue Act of 1924."

Contentions Made and Not Made by the Government.

In the "Question Presented", the Government does not claim a tax "upon the interest of the decedent" as upon property *which he owned at his death.* The Government argues that the decedent had a *vested* interest in the property, *which was extinguished by his death,* but it nevertheless seeks to tax his estate upon the basis that he *owned the property at his death,* subject only to an outstanding life estate in his daughter.

To arrive at the tax, the Government takes the value of the property, deducts the value of the daughter's life estate, and includes the difference in the gross estate as the value of the decedent's interest in the property *at his death.* The Government makes no mention of the idea that the tax is to be laid as upon assets *owned by a decedent at death* but argues that the incidence of the tax rests in the taxability of transfers intended to take effect at or after death.

The Government does not contend that the transfer involved was made in contemplation of death.

It is obvious that *all* interests owned by a decedent at his death are part of (what we call for convenience) his probatable estate; but this, of course, is not true of interests owned *until death* but extinguished *at or by death.* It follows that if the decedent here involved, owned any interest *which survived his death,* such interest should be taxed *as part of his estate.* It should not be taxed as property included in a taxable transfer, made during life, unless, of course, the decedent's retained interest, in and of itself, made the entire transfer taxable as one intended to take effect at or after death.

It is plain that a reserved right of enjoyment or, to con-

trol the disposition of property which does *not continue until death* does not involve a taxable transfer as one intended to take effect at or after death.

Thus the Government (a) does not argue that the decedent held any interest in the property, at his death, which was not extinguished by his death; and (b) does not contend that the transfer was made in contemplation of death. Hence the case turns upon (1) what is meant by a transfer intended to take effect in possession or enjoyment at or after death and (2) whether such a transfer is shown by the facts of the case.

The following questions are or may be involved in the case:

1. Whether, during the life of his daughter, the interest of the donor in the transferred property was more than a mere possibility of reverter.

2. Whether a mere possibility of reverter possessed by a decedent at his death (whether it be one which survives his death and is descendible or one which is extinguished by his death) is an item of ascertainable value, to be included in his gross estate.

3. If a mere possibility of reverter is taxable, can it be taxed under a provision which taxes transfers "intended to take effect in possession or enjoyment" at or after the donor's death.

We deal with these in the order in which they are stated.

1. During the Life of His Daughter Was the Interest of the Donor in the Transferred Property More Than a Mere Possibility of Reverter?

We are not concerned with the interpretation which may be placed upon the conveyance involved in this case as leading to the view that it created a vested defeasible remainder in the donor or a contingent remainder in his daughter or otherwise. We recognize (as was said in *Klein* v. *U. S.*, 283 U. S. 231) that "nothing is to be gained by multiplying words in respect of the various niceties of the

art of conveyancing or the law of contingent and vested remainders." However, it is to be said that "unless we treat such formal distinctions as real, the law will melt away and leave not a rack behind." (per Hand, J. in *Commissioner* v. *City Bank Farmers' Trust Co.*, 74 Fed. (2nd) 242, 247)

We submit this brief upon the assumption that it may be held that the only interest in the transferred property retained by the donor to his death, was a mere possibility of reverter. The incidence of a tax as applied to a greater interest, is not here dealt with.

2. Is a Mere Possibility of Reverter Possessed by a Decedent at His Death (Whether It Be One Which Survives His Death and is Descendible or One Which is Extinguished by His Death) An Item of Ascertainable Value to be Included in His Gross Estate?

In its nature, a possibility of reverter is not taxable for the following reasons:

(a) *It is the well-established common law rule that a possibility of reverter is not an* INTEREST *in property and that the owner of a defeasible estate to which a possibility of reverter is annexed, is universally treated as the owner of the* ENTIRE *interest therein and the grantor as the owner of* NO *interest therein, until the event happens upon which the defeasance is worked and the reversion is accomplished.*

> "The proprietor of a determinable fee, so long as the estate in fee remains, till the contingency on which the estate is limited occurs, has all the rights and privileges over it that he would have if tenant in fee simple. After such a grant no right of seisin or possession remains in the grantor. All the estate is in the grantee, notwithstanding the qualification." 23 Ruling Case Law. 1104.

> "A possibility of reverter is neither an estate nor an interest in * * * property, nor an assignable nor a

devisable chose in action, nor a possibility coupled with an interest, but a bare possibility alone."

Trustees of Calvary Presbyterian Church v. Putnam, 221 App. Div. 502, 504 (affirmed 249 N. Y. 111).

"The possibility of reverter, where land has been conveyed by a deed which provides that the property shall revert to the grantor in case it ceases to be used for the purposes for which it was granted, is not such an estate as the grantor can convey or assign, and does not pass under a quit-claim deed made before the reverter takes place." North v. Graham, 235 Ill. 178; 85 N. E. 267 (Syllabus 2 in 235 Ill. 178).

"Where real estate is taken by a municipality for a public use, one whose interest in the land is a mere possibility of reverter upon a determinable fee, or a right of entry for breach of condition subsequent, has no ownership therein which entitles him to damages for the taking." Lyford v. Laconia, 75 N. H. 220; (Syllabus 3).

See also:

Upington v. Corrigan, 151 N. Y. 143.
Calvary Presbyterian Church v. Putnam, 249 N. Y. 111.
3 Thompson on Real Property, Sec. 2111.

Indeed, in all creations of defeasible estates, where no right of reverter is expressly reserved, a possibility of reverter exists *as matter of law*. This is upon the theory that a grantor reserves all rights which are not unequivocally granted by his conveyance. It is true that, in many instances, an express provision for reverter is inserted so as to make clear that the estate conveyed is defeasible, but if a defeasible estate is clearly created, no provision for a reverter is necessary.

"It [a reversion] differs from a remainder in that it arises by act of law, whereas a remainder is by act of the parties."

Minor and Wurts, Real Property, Sec. 660, p. 529.

(b) A mere possibility of a reverter is not taxable because of the inherent practical difficulties in ever arriving at its value.

Cases can easily be imagined where the number of contingencies upon which the reverter is based is numerous, making any valuation of the possibility of the reverter impossible except by "mere speculation bearing the delusive appearance of accuracy" which would be a "guess" or a "gamble" rather than a valuation based upon competent factors as pointed out by Mr. Justice Brandeis in *Humes* v. *United States*, 276 U. S. 487, 494.

In the case just cited, this Court held that a contingent bequest to charity was not deductible from the gross estate of a decedent for estate tax purposes because it was impossible of valuation in view of the contingencies upon which it was limited to take effect.

See also in this connection, *Burnet* v. *Pacific Southwestern Trust & Savings Bank* (9 C.C.A., 1930) 45 Fed. (2d) 773 (Certiorari denied, 283 U. S. 825).

The possibility of a reverter such as we are dealing with in this case (if the donor's reserved right be held to be such and nothing more) did not survive the donor's death; it was extinguished at his death. For this reason, it did not and could not constitute a probatable asset. There are cases, however, where a possibility of reverter exists which survives a grantor's death and descends (by right of representation) to his heirs, as at common law, or to his assignees or devisees under statutory authority (*Upington* v. *Corrigan*, 151 N. Y. 143; *Calvary Presbyterian Church* v. *Putnam*, 249 N. Y. 111).

(c) If proposition (a) above is not to be accepted as fully as stated, nevertheless the possibility of a reverter which depends upon a person with a shorter life's expectancy (as a father) surviving a person with a longer life's expectancy (as an adult daughter), which is the case here, is more imaginary than real having regard to the practical affairs of life.

In "Restatement of Property" Tentative Draft No. 4 transfers *inter vivos* are dealt with in Chapter 6, pp. 12-48, and succession on death in Chapter 7, pp. 49-64.

It is stated therein that a possibility of reverter is transferable in life and transmittable at death.

Even if the Restatement be accepted, all the practical difficulties of dealing with a possibility of reverter as an interest in property to be valued and taxed still remain.

3. If a Mere Possibility of Reverter is Taxable Can It Be Taxed Under a Provision Which Taxes Transfers "Intended to Take Effect in Possession or Enjoyment at or After" the Death of a Grantor?

Transfers "made or intended to take effect in possession or enjoyment after the death of the grantor" were first taxed in Pennsylvania in 1826. *Reish* v. *Commonwealth*, 106 Pa. St. 521.

The most that could be said for such a statute, would be that the tax is laid only upon transfers of property, *the possession or enjoyment of which the grantor reserves to himself until his death.* It does not cover a case where the grantor parts with the possession or enjoyment of the property *before his death;* on the contrary it reaches only the interest the possession or enjoyment of *which passes from the grantor at his death.*

Historically, the phrase "take effect in possession or enjoyment" is part of the definition of a remainder.

In 2 Fearne on Remainders, sec. 160 (4th Am. ed. 1845), a remainder is described "as limited to *take effect, in pos-*

session, or in enjoyment, or in both, after the regular expiration of another estate."

In 2 Washburn on Real Property (4th ed. 1876), it is said:

> "A remainder may be defined to be an estate or interest in land or tenements to take effect in possession or enjoyment immediately upon the determination of a prior estate." (p. 539)

Also, that it is appropriate to apply "the term possession to corporeal, and that of enjoyment to incorporeal, hereditaments" (p. 536).

Again, it may be said that "possession" is the appropriate word to use in connection with *legal* remainders and that "enjoyment" is properly used when speaking of *equitable* interests.

The above quoted paragraph also appears in 2 Washburn 1st ed. (1860-1862), pp. 222-223, and Matter of Brandreth (169 N. Y. 437, 441) cites the paragraph from the first edition.

A similar definition is found in 2 Blackstone Commentaries, p. 164, 1818 Am. ed. from the then last London edition.

It is clear, from the foregoing, that the phrase "to take effect in possession or enjoyment after" the death of the grantor first used in Pennsylvania in 1826 was taken from the definition of a remainder and that its application could not extend at most beyond transfers which created future interests in property, the possession and enjoyment of which *continued in the grantor until his death.*

Congress thus in 1916 and later provided for the taxation of a type of transfer universally known in legal and historical fields and that type of transfer is neither to be enlarged nor contracted by interpretation. The Act of Congress identifies the subject matter and history and the law supplies its characteristics.

> "In a matter of this import, the reasonable presumption is that the words . . . were used, not loosely, but with regard to their established legal significance, and in construing a statute a technical meaning should be given to technical words, unless a contrary meaning is unmistakably intended." People v. Wainwright, 227 N. Y. 407, 412.

Having regard to the legal and historical significance of the phrase "to take effect in possession or enjoyment at or after death," it is impossible to apply it to a mere possibility of a reverter in a grantor who had transferred the possession and enjoyment of property to another and who, at his death, had no *particular* estate in the property, which any *future* interest therein could follow.

Pages 22 to 33 of Brief for Respondents in *Helvering* v. *Duke*, 290 U. S. 591, discuss some of these propositions at greater length, and we hereby refer to them.

Respectfully submitted,

GARRET W. MCENERNEY,
San Francisco,
Amicus Curiae.

Washington, D. C.,
October 24, 1935.

SUPREME COURT OF THE UNITED STATES.

No. 25.—October Term, 1935.

Guy T. Helvering, Commissioner of Internal Revenue, Petitioner,
vs.
St. Louis Union Trust Company, as Successor Trustee to Liberty Central Trust Company, as Sole Residuary Legatee and Distributee of the American Estate of William J. Orthwein, Deceased, et al.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

[November 11, 1935.]

Mr. Justice Sutherland delivered the opinion of the Court.

The decedent, several years prior to his death, transferred to a trustee certain securities in trust, to be held, managed and disposed of as an active trust, the net income thereof to be paid to the decedent's daughter during her life, with remainder over to the persons named. The trustee was given discretionary power to terminate the trust whenever the trustee might deem it wise to do so, whereupon the estate was to revert to the grantor. The indenture contained a further provision that if the daughter predecease the grantor, the trust shall terminate and the trust estate be transferred, paid over and delivered to the grantor, to be his absolutely. It is this latter provision which gives rise to the question we are called upon to consider. By the terms of the indenture, the grantor recited that it was his intention to make for the benefit of his daughter "an absolute and irrevocable gift and settlement of the property . . . so that the grantor shall during the life of his said daughter have no further individual or beneficial interest therein." The grant was final and absolute in terms, and beyond the power of the grantor to revoke or alter. At the death of the grantor, neither of the contingencies upon which the trust estate would revert to the grantor had taken place.

The commissioner assessed a deficiency tax against the estate upon the view that the grantor, having reserved the right to a

revestment in him of the trust property, title to which he had conveyed, upon the happening of either of the contingencies mentioned, the transfer to the trustee was one "intended to take effect in possession or enjoyment at or after his death" within the meaning of § 302 (c), Revenue Act of 1924, c. 234, 43 Stat. 253, 304.*

The Board of Tax Appeals decided against the commissioner's view (28 B. T. A. 107), and its holding was upheld by the court below. 75 F. (2d) 416.

The substantive provision of the act which imposes the tax is § 301 (a); and by that provision the tax is laid "upon the transfer of the net estate of every decedent dying after the enactment of this act." The event which gives rise to the tax is the *death* of the decedent, with the resulting *transfer* of his estate either by will or the law relating to intestacy. When, therefore, § 302 (c) includes within the purview of § 301 (a) a transfer *inter vivos* "intended to take effect in possession or enjoyment at or after his death", it does so upon the theory that such a transfer in effect is testamentary—that is to say, a substitute for either a disposition by will or a passing in virtue of intestacy.

"But such a transfer, not so made, embodies a transaction begun and completed wholly by and between the living, taxable as a gift (Bromley *v.* McCaughn, 280 U. S. 124), but obviously not subject to any form of death duty, since it bears no relation whatever to death. The 'generating source' of such a gift is to be found in the facts of life and not in the circumstance of death. And the death afterward of the donor in no way changes the situation; that is to say, the death does not result in a shifting, or in the completion of a shifting, to the donee of any economic benefit of property, which is the subject of a death tax, Chase Nat. Bank *v.* United States, 278 U. S. 327, 338; Reinecke *v.* Northern Trust Co., 278 U. S. 339, 346; Saltonstall *v.* Saltonstall, 276 U. S. 260, 271; nor does the death in such case bring into being, or ripen for the donee or anyone else, so far as the gift is concerned, any property right or interest which can be the subject of any form of death tax. Compare Tyler *v.* United States, 281 U. S. 497, 503. Complete ownership of the gift, together with all its incidents, has passed during the life of both donor and donee, and no interest of any kind remains to pass to one or cease in the other *in con-*

*Sec. 302 provides that there shall be included in the gross estate the value of all property—

"(c) To the extent of any interest therein of which the decedent has at any time made a transfer, or with respect to which he has at any time created a trust, in contemplation of or intended to take effect in possession or enjoyment at or after his death, . . ."

sequence of the death which happens afterward." (Ital. added.) *Heiner* v. *Donnan*, 285 U. S. 312, 322-323.

The property brought into the estate by subdivision 302 (c) for the purpose of the tax is, as said by this court in *Reinecke* v. *Trust Co.*, 278 U. S. 339, 348,

". . . either property transferred in contemplation of death or property passing out of the control, possession or enjoyment of the decedent at his death. . . . In the light of the general purpose of the statute and the language of [§ 301 (a)] explicitly imposing the tax on net estates of decedents, we think it at least doubtful whether the trusts or interests in a trust intended to be reached by the phrase in [§ 302 (c)] 'to take effect in possession or enjoyment at or after his death,' include any others than *those passing from the possession, enjoyment or control of the donor at his death* and so taxable as transfers at death under [§ 301 (a)]. That doubt must be resolved in favor of the taxpayer." (Ital. added).

If, therefore, no interest in the property involved in a given case pass "from the possession, enjoyment or control of the donor at his death", there is no interest with respect to which the decedent has created a trust intended to take effect in possession or enjoyment at or after his death. The grantor here, by the trust instrument, left in himself no power to resume ownership, possession or enjoyment except upon a contingency in the nature of a condition subsequent, the occurrence of which was entirely fortuitous so far as any control, design or volition on his part was concerned. After the execution of the trust he held no right in the trust estate which in any sense was the subject of testamentary disposition. His death passed no interest to any of the beneficiaries of the trust, and enlarged none beyond what was conveyed by the indenture. His death simply put an end to what, at best, was a mere possibility of a reverter by extinguishing it—that is to say, by converting what was merely possible into an utter impossibility. This is well stated by the court below (75 F. (2d) at page 418):

"It was only in the case of the happening of certain contingencies over which he had no control that the property would revert to him. One of these contingencies was the death of his daughter prior to his death, while the trust still continued; and the second was a termination by the trustee of the trust during the lifetime of the grantor. Neither of these contingencies occurred,

and there was, during the decedent's lifetime, nothing more than a possibility that either would occur. In no proper sense was there an enlargement of the interests of the beneficiaries of the trust resulting from the death of the decedent. That event merely changed the possibility that the property would revert into an impossibility.'

It is not, in reason, possible to find in the circumstances anything which suggests that the death of the grantor, whenever it might happen, would effect any change, or was intended to effect any change, in the extent or quality of the estates conveyed in trust. The only death which could have had any such effect was that of the daughter, the grantee; and that event did not take place.

In that connection see *Matter of Barstow*, 230 N. Y. App. Div. 371, 372-3, aff'd 256 N. Y. 647. There the donor transferred irrevocably certain property to a trustee to be held in trust for the benefit of two daughters, with the condition that upon the death of both, the fund then in the hands of the trustee was to be transferred back to the donor if then living. The donor died leaving her daughters still living. The court held that the transfer took place when the deed of trust was executed and not when the donor died.

"Mrs. Barstow could do nothing to change the effect of the deed. The corpus was beyond her control, except for the happening of the contingency that she might survive the two life tenants, and then she would have been revested with the corpus. The rights of the beneficiaries did not depend upon the death of the donor. The term of the trust was not measured by the life of the donor, but by the lives of her two daughters. They had an interest in principal and income, provided one or both survived the donor. They took a vested estate subject to being divested if the donor survived both daughters. If we 'are to view the sequence of events in the order of the actual rather than the possible' (Matter of Schmidlapp, 236 N. Y. 278, 284), then we have not only a right, but are bound to conclude that because Mrs. Barstow died before the termination of the trust which she created, the transfer took place when the deed was executed, and not when she died. There was the contingency that she might survive her daughters, but that did not depend upon any affirmative or volitional act of the donor."

We think it unnecessary further to review the decisions which support our conclusion. In addition to those already cited, the following are in point: *May* v. *Heiner*, 281 U. S. 238, 243; *Coolidge*

v. *Long*, 282 U. S. 582; *McCormick* v. *Burnet*, 283 U. S. 784, reversing the Circuit Court of Appeals for the Seventh Circuit (43 F. (2d) 277), and in effect affirming the Board of Tax Appeals, 13 B. T. A. 423, 437; *Helvering* v. *Duke*, 23 B. T. A. 1104, 1113, aff'd 62 F. (2d) 1057, and affirmed by an equally divided court in 290 U. S. 591; *Helvering* v. *Wallace*, 27 B. T. A. 902, 910, 913, aff'd 71 F. (2d) 1002, certiorari denied 293 U. S. 600; *St. Louis Union Trust Co.* v. *Becker*, 76 F. (2d) 851.

The case of *Klein* v. *United States*, 283 U. S. 231, which is strongly relied upon by the government, does not support its position. There the grantor, 15 months prior to his wife's death, conveyed to his wife by deed a life estate in certain lands. But in the event that she survived the grantor "and in that case only" she was to take the lands in fee simple. The effect of this deed, we held, was that only a life estate was vested, the remainder being retained by the grantor; and whether that should ever become vested in the grantee depended upon the condition precedent that the grantor die during the life of the grantee. The grantor having died first, his death clearly effected a transmission of the larger estate to the grantee. But here the grantor parted with the title and all beneficial interest in the property, retaining no right with respect to it which would pass to anyone as a result of his death. Unlike the *Klein* case, where the death was the generating source of the title, here, as the court below said, the trust instrument and not the death was the generating source. The death did not transmit the possibility, but destroyed it.

Judgment affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.

SUPREME COURT OF THE UNITED STATES.

No. 25.—October Term, 1935.

Guy T. Helvering, Commissioner of Internal Revenue, Petitioner,
vs.
St. Louis Union Trust Company, as Successor Trustee to Liberty Central Trust Company, as Sole Residuary Legatee and Distributee of the American Estate of William J. Orthwein, Deceased, et al.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

[November 11, 1935.]

Mr. Justice Stone.

Decedent, in making disposition of his property by his trust deed, retained a valuable interest in the property by which he postponed final disposition of it until his death. I think that the value of that interest was rightly subjected to the tax imposed by § 302 (c). This conclusion is strengthened and not avoided by construing the section as imposing a tax on the value of the interest which is shifted from donor to donee on the former's death. Although the tax is a death tax, § 302 (c) nevertheless applies to any interest in gifts *inter vivos* which, by their provisions, are "intended to take effect in possession or enjoyment at or after death," and such gifts are subjected to the tax as a death tax if they are not complete until the donor's death. *Reinecke* v. *Northern Trust Co.*, 278 U. S. 339, 345; *Klein* v. *United States*, 283 U. S. 232. The decedent's death, operating upon his gift *inter vivos* not complete until his death, is the event which calls the statute into operation. *Klein* v. *United States*, *supra*, 234.

The section, in its scope and purpose, is thus similar to § 302 (d) which includes in the decedent's taxable estate the value of his interest held as joint tenant or tenant by the entirety, although created by deed *inter vivos*. *Tyler* v. *United States*, 281 U. S. 497; *Phillips* v. *Dime Trust & S. D. Co.*, 284 U. S. 160. Both provisions prevent tax evasion by subjecting to the death tax, forms of gifts *inter vivos* which may be resorted to, as a substitute for a will, in

making dispositions of property operative at death. See *Tyler* v. *United States, supra*, 505. Compare No. 10, *Helvering* v. *City Bank Farmers Trust Co.*, decided this day.

It seems plain that the gift here was not complete until decedent's death. He did not desire to make a complete gift. He wished to keep the property for himself in case he survived his daughter. He kept this hold upon it by reserving from his gift an interest, terminable only at his death, by which full ownership would be restored to him if he survived his daughter. If he had reserved a power to revoke the trust, if he survived her, *Reinecke* v. *Northern Trust Co., supra*, would have made the gift taxable, as would *Klein* v. *United States, supra*, if he had reserved a remainder in himself with gift over, if he did not survive his daughter. Instead, by using a different form of words, he attained the same end and has escaped the tax.

Having in mind the purpose of the statute and the breadth of its language it would seem to be of no consequence what particular conveyancers' device—what particular string—the decedent selected to hold in suspense the ultimate disposition of his property until the moment of his death. In determining whether a taxable transfer becomes complete only at death we look to substance, not to form. *Klein* v. *United States, supra*, 234; *Chase National Bank* v. *United States*, 278 U. S. 327, 335; *Reinecke* v. *Northern Trust Co., supra*, 345; *Saltonstall* v. *Saltonstall*, 276 U. S. 260, 271. However we label the device it is but a means by which the gift is rendered incomplete until the donor's death. The extent to which it is incomplete marks the extent of the "interest" passing at death, which the statute taxes.

The judgment should be reversed.

The CHIEF JUSTICE, Mr. Justice BRANDEIS and Mr. Justice CARDOZO join in this opinion.